

Understanding the Presidency

EDITION
NO. 07

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3. In a new reading, Louis Fisher argues that constitutionally, Congress should have been involved with President Obama's decision to intervene militarily in Libya in the spring of 2011.
4. The operation of the White House and President Obama's process of decision making is the subject of James Pfiffner's analysis of three major Obama decisions: how to deal with detainees in Guantanamo, his major economic policy decisions, and his decision to escalate the war in Afghanistan.
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6. With the 2008 campaign expenditures setting new records in spending, Clyde Wilcox and his co-authors provide an account of the rules and regulations that will affect the 2012 race for the presidency.

Understanding the Presidency

Seventh Edition

Edited by

JAMES P. **PFIFFNER**

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PREFACE

The genesis of this book lies in our classroom experience. We both had been teaching courses on the presidency for a number of years at the graduate and undergraduate levels. Each semester, we sought the right combination of texts to give our students the optimum mix of basic principles, readings, and source materials on the presidency. Unable to find the right mix and balance of these materials in a single collection, we began to put together a book ourselves. We decided that an effective edited volume on the presidency ought to be comprehensive, to include both historical and current perspectives, to contain both “classic” articles and original essays, and to be accessible to undergraduates.

We both have had experience assigning comprehensive texts in our presidency courses. Although the best of these texts ensure good coverage of all important aspects of the presidency, supplementary readings can provide more in-depth coverage of specific issues in the distinctive voices of scholars in their areas of expertise. We have also taught the presidency course using short supplementary texts. What is often missing, or at least difficult to achieve with this approach, is comprehensive coverage of all the important topics. Thus, we envisioned a presidency reader that would include selections on the most important dimensions of the subject. Bearing this in mind, we designed this reader.

From our experience in the classroom, we are aware that our students need a greater appreciation of the history of the United States. Thus, we have included essays on the creation of the presidency and the development of the office over two centuries. Among these are several seminal statements by the Framers as well as important interpretations by Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, and William Howard Taft. Because we also appreciate that student interest is often piqued by contemporary events and issues, we have included selections on current issues.

We wanted to include a number of articles we consider the classics of presidency studies from 20th-century scholarship: ideas and authors to whom our students ought to be exposed. Thus, we have included selections by Richard Neustadt, Hugh Heclo, and Stephen Skowronek. We also wanted to offer students original analyses of some of the best presidency scholars of the day. We sought out articles by Lara Brown, John Burke, James Campbell, Louis Fisher, George Edwards, Michael Genovese, John Anthony Maltese, Richard Pious, and Clyde Wilcox. We asked these authors to take up the issues of their scholarly specialties but to aim their analyses at a general and accessible level; we are grateful that each of them has written an original article for our volume. In addition, the volume includes several articles by each of the editors, updated for the seventh edition.

NEW TO THE SEVENTH EDITION

Since the sixth edition, new developments have affected the issues covered in some articles in the volume, and readings have been revised to reflect these new developments. Lara Brown has updated her reading to include the run-up to the 2012 presidential nominations. Clyde Wilcox et al. has brought his campaign finance analysis up to date.

John Anthony Maltese has updated his reading to include President Obama's appointment of Elena Kagan to the Supreme Court. Roger H. Davidson has updated both of his articles to take into account the first half of the Obama administration. Finally, James Pfiffner has added a comparison of President Obama's exercise of executive authority to his account of the Bush administration.

Good scholarship on the Obama presidency, newly available since the sixth edition, is included in this revised edition. Gary Jacobson analyzes President Obama's policy victories with Congress and explains why these have not been turned into partisan political success. Zachary Courser gives us an account of how the Tea Party affected the 2010 elections and its likely impact on the 2012 election cycle. Louis Fisher contributes an original article, written especially for this volume, on President Obama's refusal to obtain congressional approval of the intervention in Libya in the spring and summer of 2011. We have included Stephen Wayne's treatment of President Obama's character and judgment as reflected in his major policy decisions. Finally, James Pfiffner analyzes decision making in the Obama White House.

Our goal, as always, has been to make available for our own classes and other college courses a broad presidency reader that covers the important topics that ought to be covered in college courses. The selections in this volume, we believe, represent some of the best presidential scholarship available and yet remain compelling and engaging for undergraduates.

JAMES P. PFIFFNER
ROGER H. DAVIDSON

Constitutional Origins of the Presidency

In creating the presidency, the Constitution's drafters had to improvise. As advocates of parliamentary power, they had no intention of installing an all-important executive. No form of monarchy—not even a constitutionally limited one—was acceptable. Strong, legitimate legislative assemblies were deeply implanted in New World soil through the colonial (and later state) legislatures, the Continental Congresses, and finally, the Articles of Confederation's Congress.

The very tradition of strong legislatures and weak executives, however, caused trouble. The nation's first governing charter—the Articles of Confederation adopted in 1781—failed to promote political or economic stability. Under the Articles, Congress proved to be unequal to the tasks of providing for the common defense, conducting relations with foreign powers, and regulating commerce and coinage. James Madison declared that executives in the new nation had become “ciphers,” while legislatures were “omnipotent.” He complained that constitutional limits were “readily overleaped by the legislature on the spur of an occasion.”

The question of governmental powers had been addressed by a remarkable body of 17th- and 18th-century political writing from such British and Continental thinkers as James Harrington (1611–1677), John Locke (1632–1704), Baron de Montesquieu (1689–1755), and William Blackstone (1723–1780). These philosophers saw parliamentary power as the most authentic expression of the community's will. But this power was not unlimited. National emergencies, for example, might require executives to take action beyond existing legislative statutes, or even against them (Locke's “prerogative power”). In addition, according to Locke, Blackstone, and especially Montesquieu, liberty is best preserved by dividing governmental powers among several separate entities that can check and balance each other.

Another set of influences emanated from the North American side of the Atlantic Ocean. No one should ignore the fact that 180 years elapsed between the first English settlements at Jamestown, Virginia, and the Constitutional Convention of 1787. These New World experiences were at least as vivid in the Founders' thinking as the Old World's parliamentary struggles and

philosophical writings. Citizens' experiences, first as colonists under British rule and then as citizens of the new nation, shaped their approach to government and, in particular, to executive authority. Although the Founders naturally favored legislative institutions, some of their most articulate leaders sought a strong, independent executive to counterbalance any legislative supremacy. They saw that Congress under the Articles (which lacked a separate executive or judicial branch)—not to mention the all-powerful legislatures of the new states—was unable to act decisively to resolve common problems and ensure order in the widely spread new nation. They found their model, as historian Charles C. Thach showed, in the newly strengthened governorships of New York and Massachusetts, which were created when those states revised their original constitutions to achieve a more balanced government.

Another model for the presidential office must not be overlooked: the dignified yet modest presence of George Washington, who presided over the Philadelphia convention. There is scant evidence that Washington voiced any important substantive suggestions concerning the document's content. Yet his calm demeanor was of incalculable value to the whole enterprise. Indeed, the very term "president" comes from the Latin verb *praesidere*, "to preside."

So even if no precise historical precedent existed, the delegates could see before them the kind of individual they desired. "*Entre nous*," Pierce Butler wrote to an English friend, "I do [not] believe they [the executive powers] would have been so great, had not many of the members cast their eyes toward General Washington as President, and shaped their Ideas of the Powers to be given a President, by their opinions of his Virtue." Benjamin Franklin sagely remarked that "the first man put at the helm will be a good one. Nobody knows . . . what sort may come afterwards."

Advocates of an independent and potentially strong executive—Madison of Virginia, James Wilson and Gouverneur Morris of Pennsylvania, and Alexander Hamilton of New York—were among the liveliest minds at the Constitutional Convention. Often called the father of the presidency, Wilson wanted an executive with "energy dispatch, and responsibility." A champion of strong government, Hamilton wrote that an "energetic government" was the most prized goal of the Convention. A leader of the Convention's drafting committee, Morris favored a strong, independent—and popularly elected—executive.

Led by these individuals, the Convention reached a series of fateful decisions that outlined the features of the modern presidency. The most prominent provisions were:

1. The president is an individual (not a council).
2. The president is selected independently of Congress, at least under normal conditions. (The House makes the selection when no candidate has a majority in the Electoral College.)
3. The president's mandate is vaguely stated but potentially broad—for example, the "vesting" and "take care" clauses.
4. The president is the head of the executive branch.

5. The president shares policymaking powers with Congress: He may recommend legislation and veto acts of Congress (although vetoes can be overturned by a two-thirds vote in both chambers).
6. The president is chief diplomat, but foreign policy is shared with Congress: The president makes treaties only with the advice and consent of the Senate.
7. The so-called war powers also are split. The president is commander-in-chief; but Congress has power to declare war as well as to raise and support armies, provide and maintain a navy, and make rules governing the military forces, including those governing “captures on land and water.”
8. The president has the power to appoint “officers of the United States,” subject to the Senate’s advice and consent.
9. The president is eligible for reelection (later limited to two terms by the 22nd Amendment) and can be removed from office only by impeachment and conviction for “treason, bribery, or other high crimes and misdemeanors.”

Shortly after the Philadelphia Convention, James Madison—unquestionably the Convention’s most influential member—wrote to his colleague Thomas Jefferson (who was in France and was not involved in drafting the Constitution) to report on the Convention’s work. His letter, reprinted here, reviews the main objectives of the Convention and its key debates: over the definition of the executive (whether a single person or a plurality), alternative methods of selecting the president (whether by Congress, the executives of the states, or the people at large), duration of executive tenure, eligibility for reelection, and appointment power of the president.

The Federalists—those who supported the new Constitution and, especially, the notion of an independent executive—eloquently made their case in a series of articles that appeared between October 1787 and July 1788 in a New York newspaper, the *Independent Journal*. The authors were Madison, Hamilton, and John Jay, all writing under the pseudonym “Publius.” These 85 *Federalist Papers* are considered the most important work of political theory ever written in the United States. At the very least, they offer clear evidence of what the Constitution’s most influential architects thought they had achieved and how they justified ratification of their handiwork. Hamilton was the most passionate advocate of a strong executive; *Federalist* Nos. 69 and 70 are the most eloquent of his 11 essays (numbers 67 through 77) on this subject. In the first of these two essays, Hamilton reviews the president’s constitutional powers, at the same time taking pains to calm anti-federalists’ fears by enumerating the limits and checks upon these powers (compared to, say, British sovereigns). In the second, by contrast, he extols the necessity of an “energetic executive” and explains its ingredients.

The Constitution’s opponents—the anti-federalists—argued that the new Constitution granted excessive power to the executive and restored much of the same royal authority they had sought to overthrow. For example, New York Governor George Clinton (1777–1795; 1800–1803) opposed

ratification because the Constitution seemed to condone indefinite reelection of the president—which could result in presidents establishing themselves in office for life. Clinton also worried about the absence of a council to advise and assist the president as well as the enormous grants of power over making appointments, receiving ambassadors, vetoing legislation, and granting pardons. In addition, he was troubled by the fact that, unlike the governor of New York, the president was not elected directly by the people.

Although the Federalists narrowly won ratification of their design for what Hamilton termed “energetic government,” battles still rage between advocates of strong central authority and those who favor rolling back federal power and returning it to states, localities, and private entities. Even after more than two centuries, Americans are of two minds about national government: On the one hand, they insist on the benefits that it provides, but on the other, they distrust its ability to solve problems and resent its inevitable intrusions on their individual lives.

One seemingly innocuous provision dealt with qualifications for the office of president. The delegates dismissed most proposed limitations—in particular, religion or property ownership. In the end, only three qualifications were named for federal elected officers: in the case of the presidency, age (at least 35 years), residency (at least 14 years), and citizenship (an aspirant today must be “a natural born citizen”—that is, born in this country or, if born abroad, the child of a U.S. citizen). The citizenship requirement undoubtedly flowed from understandable 18th-century fears of foreign intervention in the affairs of a newly created nation. This requirement seems outdated for a strong and stable world power with a diverse population, and it may deprive us of the potential leadership talent of individuals who do not happen to be “natural born” citizens.

The most peculiar constitutional provision, however, is the Founders’ arcane device for selecting presidents: the Electoral College. The presidency, contrary to popular belief, is *not* a popularly elected office. The Framers in Philadelphia—divided over the role that Congress, the states, and the citizenry should play in choosing the president—came up with a scheme that embraced all of those elements. Skeptical of popular democracy—doubting, for example, that average citizens would know enough about the contenders to make an informed choice—the drafting committee devised a scheme that allowed both the states and the two houses of Congress to play a role. Presidents would be selected by electors, who in turn are chosen by their states. In case no candidate attained a majority of all the electors (the Electoral College), the House would choose the president—and the Senate the vice president—with each state delegation casting a single vote.

Who could have predicted that, within a few decades, the states would turn over selection of electors to a general vote? Who would have thought that advances in communication and transportation could blanket the entire country with information about candidates or factions? Who would have known that candidates for president and vice president would run together on a slate put up by their political parties? And who would have guessed that members of the Electoral College themselves would be chosen from party slates, and

that they would be required (in many states) to vote for their party's nominee? All of these eventualities came to pass, profoundly changing the nature and conduct of presidential elections.

Yet the Electoral College survives, along with the possibility that the candidate with the popular-vote majority could lose the electoral vote. Such a result occurred most recently in 2000, when a bitterly contested Florida victory gave George W. Bush a narrow Electoral College margin, even though he trailed his rival, Democrat Al Gore, by some half million popular votes nationwide. James P. Pfiffner reviews the Electoral College's historical quirks and explains the proposals to simplify or scrap the existing system (none of which, alas, has much chance of adoption).

Arguments over executive power are similarly recurrent, although these battle lines often are rather different from those waged over the proper scope of the federal government. The problem arises in large part from the Constitution itself, which separates policymaking responsibilities, describing presidential powers and duties far less precisely than it does those given to Congress. The famous dictum of constitutional scholar Edward S. Corwin—that the document is “an invitation to struggle” between the two branches—referred to foreign policy, but it is even more true in domestic affairs. Thus, the powers of the modern presidency in large part are the outcome of initiatives and precedents that have accumulated over more than two centuries of history—including crises, wars, depressions, political realignments, and institutional adjustments both large and small.

The ultimate paradox of the presidency, as political scientist Thomas E. Cronin wrote, is that “it is always too powerful and yet it is always inadequate.” By some accounts, the office is weak and confined; by others, it is dangerously out of control. Citizens, too, are ambivalent about presidential power. Seemingly, they enjoy seeing their presidents humbled or cut down to size. At the same time, people continue to yearn for heroic presidents—extraordinary leaders who can somehow rise above the clamor of “mere politicians” and set the country on the right course.

SELECTED BIBLIOGRAPHY

- Corwin, Edward S., *The President: Office and Powers 1787–1957*, 4th rev. ed. (New York: New York University Press, 1957).
- Cronin, Thomas E., and Michael A. Genovese, *The Paradoxes of the American Presidency* (New York: Oxford University Press, 2004).
- Edwards, George C. III, *Why the Electoral College Is Bad for America* (New Haven: Yale University Press, 2004).
- Hamilton, Alexander, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin Books, 1961).
- Mansfield, Harvey C., Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore, MD: The Johns Hopkins University Press, 1993).
- Milkis, Sidney M., and Michael Nelson, *The American Presidency: Origins and Development, 1776–2011*, 6th ed. (Washington, DC: CQ Press, 2011).
- Thach, Charles C., Jr., *The Creation of the Presidency 1775–1789* (Baltimore, MD: The Johns Hopkins University Press, 1989).

Reading 1

James Madison to Thomas Jefferson

JAMES MADISON

New York October 24, 1787

You will herewith receive the result of the Convention, which continued its session till the 17th of September. I take the liberty of making some observations on the subject, which will help to make up a letter, if they should answer no other purpose.

This ground-work being laid, the great objects which presented themselves were (1) to unite a proper energy in the Executive, and a proper stability in the Legislative departments, with the essential characters of Republican Government (2) to draw a line of demarkation which would give to the Central Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them (3) to provide for the different interests of different parts of the Union (4) to adjust the clashing pretensions of the large and small States. Each of these objects was pregnant with difficulties. The whole of them together formed a task more difficult than can be well conceived by those who were not concerned in the execution of it. Adding to these considerations the natural diversity of human opinions on all new and complicated subjects, it is impossible to consider the degree of concord which ultimately prevailed as less than a miracle.

The first of these objects, as respects the Executive, was peculiarly embarrassing. On the question whether it should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place. The plurality of co-ordinate members had finally but few advocates. Governour Randolph was at the head of them. The modes of appointment proposed were various, as by the people at large—by electors chosen by the people—by the Executives of the States—by the Congress, some preferring a joint ballot of the two Houses—some a separate concurrent ballot, allowing to each a negative on the other house—some, a nomination of several candidates by one House, out of whom a choice should be made by the other. Several other modifications were stated. The expedient at length adopted seemed to give pretty general satisfaction to the members. As to the duration in office, a few would have preferred a tenure during good behaviour—a considerable number would have done so in case an easy & effectual removal by

impeachment could be settled. It was much agitated whether a long term, seven years for example, with a subsequent & perpetual ineligibility, or a short term with a capacity to be re-elected, should be fixed. In favor of the first opinion were urged the danger of a gradual degeneracy of re-elections from time to time, into first a life and then a hereditary tenure, and the favorable effect of an incapacity to be reappointed on the independent exercise of the Executive authority. On the other side it was contended that the prospect of necessary degradation would discourage the most dignified characters from aspiring to the office, would take away the principal motive to the faithful discharge of its duties—the hope of being rewarded with a reappointment would stimulate ambition to violent efforts for holding over the Constitutional term—and instead of producing an independent administration, and a firmer defence of the constitutional rights of the department, would render the officer more indifferent to the importance of a place which he would soon be obliged to quit forever, and more ready to yield to the encroachments of the Legislature of which he might again be a member. The questions concerning the degree of power turned chiefly on the appointment to offices, and the control on the Legislature. An *absolute* appointment to all offices—to some offices—to no offices, formed the scale of opinions on the first point. On the second, some contended for an absolute negative, as the only possible means of reducing to practice the theory of a free Government which forbids a mixture of the Legislative & Executive powers. Others would be content with a revisionary power, to be overruled by three fourths of both Houses. It was warmly urged that the judiciary department should be associated in the revision. The idea of some was that a separate revision should be given to the two departments—that if either objected two thirds, if both, three fourths, should be necessary to overrule.

Reading 2

Federalist No. 69

ALEXANDER HAMILTON

Proceed now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is that the executive authority, with few exceptions, is to be vested in a single magistrate. This will

scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seigneur, to the khan of Tartary, to the Man of the Seven Mountains or to the governor of New York.

That magistrate is to be elected for *four* years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between *him* and a king of Great Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between *him* and a governor of New York, who is elected for *three* years, and is re-eligible without limitation or intermission. . . .

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanours, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill which shall have passed the two branches of the legislature for reconsideration; and the bill so returned is to become a law if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. . . .

The President is to be the "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offences against the United States, *except in cases of impeachment*; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them *with respect to the time of adjournment*, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these

particulars the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:—*First*. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Secondly*. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. . . . *Thirdly*. The power of the President, in respect to pardons, would extend to all cases, except those of impeachment. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? . . .

Fourthly. The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue [discontinue] or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description.

. . . It must be admitted that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved it would become a question whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorised to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate and, *with the advice and consent of the Senate*, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honour. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. . . .

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally that there is no pretence for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body; the other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorise or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

Publius

Reading 3

Federalist No. 70

ALEXANDER HAMILTON

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. . . . Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. . . .

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are first, a due dependence on the people; secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the

constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men. Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction. . . .

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. . . .

In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition,—vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be apprehended from its plurality. . . .

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an

elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations to determine on whom the blame the punishment of a pernicious measure or series of pernicious measures, ought really to fall. . . .

It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall: and, *secondly*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department—an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office, the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be “deep, solid, and ingenious,” that “the executive power is more easily confined when it is ONE”; that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty. . . .

I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

Publius

Reading 4

To the Citizens of the State of New York

GEORGE CLINTON

November 8, 1787

Admitting, however, that the vast extent of America, together with the various other reasons which I offered you in my last number, against the practicability of the just exercise of the new government are insufficient to convince; still it is an undesirable truth, that its several parts are either possessed of principles, which you have heretofore considered as ruinous and that others are omitted which you have established as fundamental to your political security, and must in their operation, I will venture to assert, fetter your tongues and minds, enchain your bodies, and ultimately extinguish all that is great and noble in man.

In pursuance of my plan I shall begin with observations on the executive branch of this new system; and though it is not the first in order, as arranged therein, yet being the *chief*, is perhaps entitled by the rules of rank to the first consideration. The executive power as described in the 2d article, consists of a president and vice-president, who are to hold their offices during the term of four years; the same article has marked the manner and time of their election, and established the qualifications of the president; it also provides against the removal, death, or inability of the president and vice-president—regulates the salary of the president, delineates his duties and powers; and, lastly, declares the causes for which the president and vice-president shall be removed from office.

Notwithstanding the great learning and abilities of the gentlemen who composed the convention, it may be here remarked with deference, that the construction of the first paragraph of the first section of the second article is vague and inexplicit, and leaves the mind in doubt as to the election of a president and vice-president, after the expiration of the election for the first term of four years: in every other case, the election of these great officers is expressly provided for; but there is no explicit provision for their election in case of expiration of their

offices, subsequent to the election which is to set this political machine in motion; no certain and express terms as in your state constitution, that *statedly* once in every four years, and as often as these offices shall become vacant, by expiration or otherwise, as is therein expressed, an election shall be held as follows, &c., this inexplicitness perhaps may lead to an establishment for life.

It is remarked by Montesquieu, in treating of republics, that in all magistracies, the greatness of the power must be compensated by the brevity of the duration, and that a longer time than a year would be dangerous. It is, therefore, obvious to the least intelligent mind to account why great power in the hands of a magistrate, and that power connected with considerable duration, may be dangerous to the liberties of a republic, the deposit of vast trusts in the hands of a single magistrate, enables him in their exercise to create a numerous train of dependents: this tempts his ambition, which in a republican magistrate is also remarked, to be pernicious, and the duration of his office for any considerable time favors his views, gives him the means and time to perfect and execute his designs, he therefore fancies that he may be great and glorious by oppressing his fellow-citizens, and raising himself to permanent grandeur on the ruins of his country. And here it may be necessary to compare the vast and important powers of the president, together with his continuance in office, with the foregoing doctrine—his eminent magisterial situation will attach many adherents to him, and he will be surrounded by expectants and courtiers, his power of nomination and influence on all appointments, the strong posts in each state comprised within his superintendence, and garrisoned by troops under his direction, his control over the army, militia, and navy, the unrestrained power of granting pardons for treason, which may be used to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt, his duration in office for four years: these, and various other principles evidently prove the truth of the position, that if the president is possessed of ambition, he has power and time sufficient to ruin his country.

Though the president, during the sitting of the legislature, is assisted by the senate, yet he is without a constitutional council in their recess; he will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments, the most dangerous council in a free country.

The ten miles square, which is to become the seat of government, will of course be the place of residence for the president and the great officers of state; the same observations of a great man will apply to the court of a president possessing the powers of a monarch, that is observed of that of a monarch—*ambition with idleness—baseness with pride—the thirst of riches without labor—aversion to truth—flattery—treason—perfidy—violation of engagements—contempt of civil duties—hope from the magistrate's weakness; but above all, the perpetual ridicule of virtue*—these, he remarks, are the characteristics by which the courts in all ages have been distinguished.

The language and the manners of this court will be what distinguishes them from the rest of the community, not what assimilates them to it; and in

being remarked for a behavior that shows they are not *meanly born*, and in adulation to people of fortune and power.

The establishment of a vice-president is as unnecessary as it is dangerous. This officer, for want of other employment, is made president of the senate, thereby blending the executive and legislative powers, besides always giving to some one state, from which he is to come, an unjust pre-eminence.

It is a maxim in republics that the representative of the people should be of their immediate choice; but by the manner in which the president is chosen, he arrives to this office at the fourth or fifth hand, nor does the highest vote, in the way he is elected, determine the choice, for it is only necessary that he should be taken from the highest of five, who may have a plurality of votes.

Compare your past opinions and sentiments with the present proposed establishment, and you will find, that if you adopt it, that it will lead you into a system which you heretofore reprobated as odious. Every American Whig, not long since, bore his emphatic testimony against a monarchical government, though limited, because of the dangerous inequality that it created among citizens as relative to their rights and property; and wherein does this president, invested with his powers and prerogatives, essentially differ from the king of Great Britain (save as to name, the creation of nobility, and some immaterial incidents, the offspring of absurdity and locality). The direct prerogatives of the president, as springing from his political character, are among the following: It is necessary, in order to distinguish him from the rest of the community, and enable him to keep, and maintain his court, that the compensation for his services, or in other words, his revenue, should be such as to enable him to appear with the splendor of a prince; he has the power of receiving ambassadors from, and a great influence on their appointments to foreign courts; as also to make treaties, leagues, and alliances with foreign states, assisted by the Senate, which when made become the supreme law of land: he is a constituent part of the legislative power, for every bill which shall pass the House of Representatives and Senate is to be presented to him for approbation; if he approves of it he is to sign it, if he disapproves he is to return it with objections, which in many cases will amount to a complete negative; and in this view he will have a great share in the power of making peace, coining money, etc., and all the various objects of legislation, expressed or implied in this Constitution: for though it may be asserted that the king of Great Britain has the express power of making peace or war, yet he never thinks it prudent to do so without the advice of his Parliament, from whom he is to derive his support, and therefore these powers, in both president and king, are substantially the same: he is the generalissimo of the nation, and of course has the command and control of the army, navy and militia; he is the general conservator of the peace of the union—he may pardon all offences, except in cases of impeachment, and the principal fountain of all offices and employments. Will not the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy or monarchy? The safety of the people in a republic depends on the share or proportion they have in the government; but experience ought to teach you, that when a man is at the head of an elective

government invested with great powers, and interested in his reelection, in what circle appointments will be made; by which means an *imperfect aristocracy* bordering on monarchy may be established.

You must, however, my countrymen, beware that the advocates of this new system do not deceive you by a fallacious resemblance between it and your own state government which you so much prize; and, if you examine, you will perceive that the chief magistrate of this state is your immediate choice, controlled and checked by a just and full representation of the people, divested of the prerogative of influencing war and peace, making treaties, receiving and sending embassies, and commanding standing armies and navies, which belong to the power of the confederation, and will be convinced that this government is no more like a true picture of your own than an Angel of Darkness resembles an Angel of Light.

NOVEMBER 22, 1787

In my last number I endeavored to prove that the language of the article relative to the establishment of the executive of this new government was vague and inexplicit; that the great powers of the president, connected with his duration in office, would lead to oppression and ruin; that he would be governed by favorites and flatterers, or that a dangerous council would be collected from the great officers of state; that the ten miles square, if the remarks of one of the wisest men, drawn from the experience of mankind, may be credited, would be the asylum of the base, idle, avaricious and ambitious, and that the court would possess a language and manners different from yours; that a vice-president is as unnecessary as he is dangerous in his influence; that the president cannot represent you because he is not of your own immediate choice; that if you adopt this government you will incline to an arbitrary and odious aristocracy or monarchy; that the president, possessed of the power given him by this frame of government, differs but very immaterially from the establishment of monarchy in Great Britain; and I warned you to beware of the fallacious resemblance that is held out to you by the advocates of this new system between it and your own state governments.

And here I cannot help remarking that inexplicitness seems to pervade this whole political fabric; certainly in political compacts, which Mr. Coke calls *the mother and nurse of repose and quietness*, the want of which induced men to engage in political society, has ever been held by a wise and free people as essential to their security; as on the one hand it fixes barriers which the ambitious and tyrannically disposed magistrate dare not overleap, and on the other, becomes a wall of safety to the community—otherwise stipulations between the governors and governed are nugatory; and you might as well deposit the important powers of legislation and execution in one or a few and permit them to govern according to their disposition and will; but the world is too full of examples, which prove that to *live by one man's will became the cause of all men's misery*. Before the existence of express political compacts it was reasonably implied that the magistrate should govern with wisdom and

justice; but mere implication was too feeble to restrain the unbridled ambition of a bad man, or afford security against negligence, cruelty or any other defect of mind. It is alleged that the opinions and manners of the people of America are capable to resist and prevent an extension of prerogative or oppression, but you must recollect that opinion and manners are mutable, and may not always be a permanent obstruction against the encroachments of government; that the progress of a commercial society begets luxury, the parent of inequality, the foe to virtue, and the enemy to restraint; and that ambition and voluptuousness, aided by flattery, will teach magistrates where limits are not explicitly fixed to have separate and distinct interests from the people; besides, it will not be denied that government assimilates the manners and opinions of the community to it. Therefore, a general presumption that rulers will govern well is not a sufficient security. You are then under a sacred obligation to provide for the safety of your posterity, and would you now basely desert their interests, when by a small share of prudence you may transmit to them a beautiful political patrimony, which will prevent the necessity of their travelling through seas of blood to obtain that which your wisdom might have secured? It is a duty you owe likewise to your own reputation, for you have a great name to lose; you are characterized as cautious, prudent and jealous in politics; whence is it therefore that you are about to precipitate yourselves into a sea of uncertainty, and adopt a system so vague, and which has discarded so many of your valuable rights? Is it because you do not believe that an American can be a tyrant? If this be the case, you rest on a weak basis: Americans are like other men in similar situations, when the manners and opinions of the community are changed by the causes I mentioned before; and your political compact inexplicit, your posterity will find that great power connected with ambition, luxury and flattery, will as readily produce a Caesar, Caligula, Nero and Domitian in America, as the same causes did in the Roman Empire.

Reading 5

Reevaluating the Electoral College

JAMES P. PFIFFNER

Alexander Hamilton concluded in Federalist No. 68 that the electoral method of choosing the chief executive of the new republic was one of the few parts of the proposed constitution that raised few objections, even by opponents of ratification. “The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any

consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." He concluded that if the manner of choice "be not perfect, it is at least excellent."

Yet experience soon provided evidence of problems in the design of the constitutional electoral mechanism. In the election of 1796, the presidential candidate of the losing faction, Thomas Jefferson (a Republican), became the vice president when Federalist John Adams was elected President.¹ In 1800, Jefferson and his vice presidential running mate Aaron Burr tied in the electoral vote, and it took 36 ballots in the House before Jefferson was elected president. The next century brought other electoral problems, and the Electoral College has been the subject of more than 700 proposals in Congress to reform the system.² In 1967, the American Bar Association declared in a report: "The electoral college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."³

This essay will first briefly examine problematic elections involving the Electoral College and the purposes of the Framers in designing the electoral mechanism. It will then examine arguments for changing the electoral provisions of the Constitution based on the democratic premise that the candidate with the most popular votes should not lose the election. Objections in principle and practicality to proposals for change will then be examined. The essay will conclude that the constitutional issues raised by the 2000 election are sufficient to reexamine the electoral mechanism for selecting the president of the United States.

PROBLEMATIC ELECTIONS: 1800, 1824, 1876, 1888

In the election of 1800, both Thomas Jefferson and Aaron Burr received the same number of electoral votes for president, even though it was well known that Jefferson was the intended nominee for president and Burr for vice president. With no majority of electoral votes, the lame-duck Federalist House of Representatives had to choose the president, and it took them 36 ballots to do so. In light of the 1800 experience, the Twelfth Amendment to the Constitution, providing for separate ballots for president and vice president, was passed and ratified.⁴

Several other presidential elections turned out to be problematic in other ways. In the election of 1824, states had begun to give their voters the right to choose the state electors, and Andrew Jackson received the most popular votes (about 38 percent); he also received the most electoral votes (99 of 261), but not a majority. Thus, the House of Representatives again had to make the choice, and it chose John Quincy Adams who had received about 32 percent of the popular vote and 84 electoral votes. Because the Twelfth Amendment reduced the number of candidates from whom the House had to choose from five to three, Speaker of the House Henry Clay—with 14 percent of the popular vote and 37 electoral votes—threw his support behind Adams, who was elected. When Clay was appointed Secretary of State in Adams's administration, Jackson charged that a corrupt deal had been made.

After the 1876 election, the nation did not know who would be president until March 2, 1877, because two separate slates of electors were sent to Congress from Florida, Louisiana, and South Carolina. When both houses of Congress failed to agree on which slates to accept as the legitimate ones, a special commission was created to make the decision. The commission consisted of five representatives, five senators, and five members of the Supreme Court. The partisan split was seven Democrats and seven Republicans, with the independent Chief Justice David Davis intended to chair the commission. When the Illinois legislature appointed Davis to be senator from Illinois, he was replaced by Republican Justice Joseph Philo Bradley who voted with the other Republicans to award all of the 20 disputed electoral votes to the Republican candidate. This decision gave Rutherford Hayes the 185 to 184 victory in the electoral vote count and the majority he needed to win the presidency. Democrat Samuel Tilden won 4,300,590 popular votes to 4,036,298 cast for Hayes. Thus the runner-up in the popular vote won 264,292 more votes than the winner of the presidency.

The election of 1888 was the only election in which the uncontested winner of the popular vote came in second in the electoral vote count and lost the presidency. Democrat Grover Cleveland won 5,537,857 votes compared to 5,447,129 votes of Indiana's Republican Benjamin Harrison. Yet Harrison won 233 of the 401 electoral votes and became president.⁵ Thus, there were three elections in the 19th century in which the runner-up in the popular vote became president because of the electoral vote provisions of the Constitution and its contingency provisions. There have been a number of close calls in the 20th century (e.g., 1948, 1960, 1968, and 1976), though the odds are against the runner-up in the popular election becoming president.⁶

But the unexpected happened in the presidential election of 2000. The race between Democrat Al Gore and Republican George W. Bush was extremely close, with the winner being determined by Florida's 25 electoral votes, which were won by Bush by a margin of 537 popular votes. Gore won the national popular vote 50,996,116 to Bush's 50,456,169, a margin of 539,947 (51.6 percent).⁷ Bush won 271 electoral votes, one more than a majority; and Gore won 266 (one District of Columbia elector cast a blank ballot). Another case of the runner-up in the popular votes being elected president raises again the question of the Electoral College mechanism for selecting the president.⁸

THE DESIGN OF THE FRAMERS

Deciding how to select the chief executive was one of the most complex challenges faced by the Framers in the summer of 1787. The method was deliberated at the Constitutional Convention on 22 different days and was the subject of 30 separate votes.⁹ The result was not a coherent design based on clear political principles, but rather a complex compromise that reflected the interests of different states. The main variables that the Framers had to consider in the selection of the executive were: who would select the person, how long the term of office would be, and whether the person would be eligible for more than one term.

For most of the convention, the assumption was that the chief executive would be chosen by the legislature, as was contemplated in the Virginia Plan drafted by James Madison. When the convention adjourned on July 25, 1787, the chief executive was to be chosen by the legislature, but the term of office was not set nor was the question of reeligibility.¹⁰ The Committee of Detail reported on August 6 this formula:

The Executive Power of the United States shall be vested in a single Person. His Stile shall be, "The President of the United States of America;" and his Title shall be, "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.¹¹

But there were still objections that a president chosen by the legislature would be too beholden to it and thus not independent enough. For this reason, James Wilson and Gouverneur Morris both argued for election by the people.¹²

The problem with selection by the people was not the Framers' distrust of this method's democratic nature (though the Framers were not trying to create a democracy). From their perspective, there were two problems with direct popular election of the president. The first was the probability that most citizens would not be personally familiar with all of the most qualified potential candidates. This was George Mason's concern; Mason thought that popular election of the president would be impractical.¹³ "He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trail of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates."¹⁴

But the more important problem was the disadvantage some states would face if the vote were based only on population. The ratio of population of the largest state, Virginia, to the smallest in population, Delaware, was about ten to one.¹⁵ In addition to the overall problem of the small states, most of the slave states had smaller populations; with a direct election, they would not be able to count their slave population as they could in calculating their representation in the House of Representatives (counting three-fifths of the slave population).

Thus the proposal to base the election of the president on the ratio of votes that was established in the Connecticut Compromise for representation in Congress was attractive. It reassured the small states, because the ratio of influence in the vote would not be the ten to one between largest and smallest, but rather a four to one ratio. In addition, the slave states' representation would reflect three-fifths of their slave populations. Madison put it this way: "The people at large was in his opinion the fittest in itself," for choosing the president, but:

There was one difficulty, however, of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence

in the election on the score of the Negroes. The Substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.¹⁶

Thus the Brearley Committee on Unfinished Parts worked for four days and reported back to the Convention on September 4 with a plan for the Electoral College. Under its plan, the selection of president would be removed from the legislature and given, in effect, to an independent “ad hoc Congress” convened solely for the purpose of selecting the president.¹⁷ Electors would be chosen by state legislatures, but they could not be members of the national government and would not meet together because of the danger of plots and cabals. The ratio of the states to the membership of the college was exactly the same as their representation in the legislature, with the number of electors equalling the number of representatives and senators to which each state was entitled. Any changes in population among the states would be reflected in changes in their congressional representation.

Each elector could vote for two persons for president, one of whom could not be an inhabitant of the same state as the elector, and the winner had to receive a majority of all electors appointed. In the event that no candidate received a majority, the choice would devolve on the House of Representatives (changed from the Senate in the original Brearley Committee plan), which would choose the president from among the top five persons receiving electoral votes. In a concession to the small states, the state delegations in the House would cast only one vote per state.

Thus, the Framers did not come up with their formulation because of a distrust of direct election by the citizens. Shlomo Slonim argues that “Only a few delegates—most notably Mason, Gerry, and Butler—were opposed in principle to direct election of the executive . . . anti-majoritarianism was by no means the primary motivation behind the creation of the Electoral College.” Rather, according to Slonim:

The delegates were confronted with a practical problem arising from the constellation of clashing forces at Philadelphia, and they devised a practical solution—an ad hoc congress that would faithfully reflect the pattern of weighted voting that was an integral part of the operation of the real Congress.¹⁸

Lucius Wilmerding, citing a number of statements by the Framers when they were explaining and defending the Constitution after the convention, also argued that their intent was for presidential selection to be based on the wishes of the citizenry. “It is clear,” he argues, “that the Framers wanted and expected the popular principle to operate in the election of the President.”¹⁹

If this reasoning is sound, recent proposals to change the method of selecting the president to more closely reflect the popular vote cannot be dismissed as undermining the Framers’ intentions. The Framers came up with the Electoral College device because of the peculiar constellation of political forces facing them at the founding, not because of fundamental political principles.

Insofar as some of those important forces, most importantly the differences between large and small states and slave and non-slave states, have dissipated over two centuries, proposals for change can be made without worry of violating the fundamental principles of the Framers.

The defense of the Electoral College system against change, then, must rest on arguments about how its current operation protects other fundamental values, such as federalism or the two-party system. Or the argument can be made that any alternative proposed to the Electoral College will have serious defects that outweigh the claimed advantages of change.

THE ARGUMENT FOR REFORMING THE ELECTORAL COLLEGE SYSTEM

The Electoral College system is "flawed" from the perspective of those who think that the candidate who wins the most popular votes should be elected president, or at least that the runner-up in the popular election should not become president. According to Arthur Schlesinger, Jr., "It is intolerable because it is undemocratic. And it is intolerable because it imposes a fatal burden on the minority president."²⁰ This perspective, it can be argued, is consistent with evolving democratic values in the United States over the past two centuries.

But first it must be recognized that the United States is not, nor was it meant to be, a pure democracy, even insofar as that might even be possible in a large nation state of 308 million citizens. Nor was it contemplated that the United States government would operate under a general principle of majority rule; though majority rule is often used in decision making within governmental institutions. The governmental system was designed by the Framers to be a republic, with representatives of the people chosen to govern. In fact, under the original Constitution, members of the House of Representatives were the only government officials to be chosen directly by the citizens of the United States. Other government officials were to be chosen by indirect means, with Senators selected by state legislatures, president and vice president by electors, and judges appointed by the president with consent of the Senate.

In addition to governmental structure, there were other important ways in which the government was not intended to be a simple democracy of majority rule. The separation of powers system with checks and balances was designed to filter popular moods and fads and slow any impulse to sudden change. The Bill of Rights was intended to ensure that the simple will of the majority could not easily infringe on the rights of citizens. The federal nature of the government was ensured by representation of the states and citizens in the Senate and House of Representatives and the independence of state governments. Thus, the United States is a federal democratic republic in its fundamental structure.

Nevertheless, since the founding of the republic the nature of our polity has changed in important ways; the Constitution has been amended to reflect some of those changes. With respect to the selection of the president, the original expectations of the Framers have been modified a number of times.

The states individually have made the most important decisions by deciding to place the right to select presidential electors in the citizens of the states. For the first quarter-century of the republic, half of the states chose electors through election by the state legislature. Half of the remainder gave the selection to the citizens by district and half by a general ticket mode in which the plurality winner received all of the votes of the state. After 1820, the general ticket method began to predominate, and by 1832, all of the states except South Carolina selected electors by popular vote.²¹ States also decided that using the winner-take-all rule rather than a district plan maximized their influence. In the modern era, only Maine and Nebraska use a district method of selecting electors (with a bonus of two for whichever candidate receives the plurality of votes in the state).

In addition to the states' separate decisions to base the selection of electors in the voters of each state, the scope of the franchise has been broadened by the passage of six constitutional amendments:

1. The Fifteenth Amendment (1870) extended the franchise to African Americans.
2. The Seventeenth Amendment (1913) provided for direct election of Senators.
3. The Nineteenth Amendment (1920) gave the right to vote to women.
4. The Twenty-third Amendment (1961) gave the vote to citizens of the District of Columbia.
5. The Twenty-fourth Amendment (1964) outlawed the poll tax.
6. The Twenty-sixth Amendment (1971) gave the vote to citizens 18 years of age.

Perhaps the most compelling argument that the president should be elected by direct popular vote is based on the premise that the president and vice president are the only national officials who represent the people as a whole and that the choice of the people is best approximated by the candidate who wins the most votes. This argument is buttressed by the declaration in the Preamble to the Constitution: "We the people. . . ." The Framers intentionally required that the Constitution be ratified by special conventions called in the separate states and not by the legislatures of the states. The import of their decision is that "the people" created the Constitution. It is not too far a stretch to argue that the choice of the people ought to determine the only national elective offices in the government.

Arguing that the president should be popularly elected in no way implies that all elements of the government ought to be chosen by majority vote. Clearly we have a mixed form of government in terms of geographic representation (the Senate) and appointed officials (federal judges). Accepting the popular election of the president in principle does not imply that all other officials ought to be popularly elected any more than accepting the appointment of judges implies that all other officials should be appointed.²²

The legitimacy of the popular election of the president among the populace is buttressed by the probability that many, if not most, citizens who go to

the polls to vote for president think that they are voting for president rather than a slate of electors. Some state ballots specify that the presidential vote is for a slate of electors, and some even list the individual electors, but many do not. At least this perception of many voters held until November 8, 2000.

PROPOSALS FOR REFORMING THE ELECTORAL COLLEGE

One of the effects of the Electoral College system is that the ballots cast by all of the voters do not carry the same weight. That is, the ratio of electoral votes to population varies from state to state, benefitting the smallest states. For example, the ratio of electoral votes to population in Wyoming (with 563,626 people and three electoral votes) is one to 187,875 and in California (with 37,253,956 people and 55 electoral votes) is one to 677,334. Thus a vote in Wyoming is several times more influential in selecting electors than a vote in California.²³

But small states are not necessarily the largest winners in the Electoral College scheme. Because most states have chosen to award all of their electors to the winner of the plurality of the votes in the state (called the unit rule or winner-take-all), the largest prizes in electoral votes are in the most populous states. Thus, inhabitants of the large states benefit from candidates' courting their votes. But in any given election whether any large state will be courted depends on whether it is "in play" in the sense that either candidate might win the plurality of its votes. For instance, in the 2000 election, George W. Bush did not spend much time campaigning in New York, because he had conceded that a majority of New York voters would probably vote for Al Gore in any case. For the same reason, Gore did not have a large incentive to spend much time in New York, except to shore up the party faithful. After his nomination, Al Gore did not even campaign in California, visiting the state only once, because he calculated that a majority of its votes were his anyway.²⁴ Similarly, Gore did not campaign much in Texas, because Bush had the state sewn up.

But the abstract inequalities of voter weight in the Electoral College system do not constitute the major problem with the system. As long as the winner of the popular vote also wins the electoral vote, there is little objection to the differently weighted votes. But this is not always the case, and the most important objection to the Electoral College design is that the runner-up in the popular vote can end up being elected president. There are three circumstances in which this can happen:

1. If several "faithless electors" do not vote as they pledged to vote, the runner-up may win the presidency.
2. If no candidate wins a majority in the Electoral College, the House of Representatives selects the president from among the top three electoral vote winners and does not have to consider the popular vote.
3. A candidate can win the majority of electoral votes without winning most of the popular votes.

The probability that electors will not vote for the candidate for whom they are pledged is not high. Electors are chosen for faithful service to their party and are firmly committed to the candidate of their party. There is little incentive for them to vote for someone else. Historically, there were only nine faithless electors out of a total of 19,744 electoral votes cast from 1789 to 1988.²⁵ Most recently, in 1988, a Democratic elector from West Virginia cast a vote for Lloyd Bentsen (the vice presidential nominee) for president rather than for Michael Dukakis, and in 1976 a Washington Republican elector voted for Ronald Reagan for president rather than the Republican nominee Gerald Ford. In the 2000 election, a 10th faithless elector was added to the list when an elector from the District of Columbia cast a blank ballot rather than voting for Al Gore, to whom she was pledged. She said that her vote was intended to protest the lack of voting representation of the District of Columbia in Congress.

In addition to the low probability of an elector's not voting for the expected nominee, the likelihood that a few faithless electors could change the outcome of an election is remote. The Electoral College usually exaggerates the margin of victory of the winner of the popular vote. Nevertheless, it is possible that a close electoral vote could be changed by the defection of just a few electors. The 2000 election is a case in point. Although Al Gore won the popular vote by a margin of more than 500,000 votes, the electoral vote was 271 to 266. In such a situation, the defection of just a few of Bush's electors could have denied a majority to either candidate, or a switch of several could have given the election to Gore. (The exact number depends on whether the blank ballot would have been counted as a vote or not.)

Although such a switch was unlikely, electors had switched before, and the temptation to go down in the history books might have tempted a few electors, as it did the elector from the District of Columbia. States, of course, have an incentive to prevent electors from defecting, and 26 states plus the District of Columbia have laws binding electors to vote for the candidate for whom they are pledged.²⁶ The constitutionality of such laws, however, would be in some doubt, because the Constitution provides that the electors will cast their ballots for president and vice president and does not bind them in any way.

The second situation has happened twice in our history. In the election of 1800, Jefferson and Burr were tied, requiring the House to choose between them. And in 1824, the House chose John Quincy Adams over Andrew Jackson, who came in first in both the popular and the electoral vote. The third scenario happened three times in our history. In 1888, the winner of the popular vote was clearly the loser in the Electoral College, and there was no dispute. In 1876, Hayes, the runner-up in the popular vote, was granted the 20 votes he needed to win a majority by the special commission created by Congress to decide how to allocate the slates of electors from the three disputed states. In general, a candidate could win the popular vote yet lose the electoral vote by losing by narrow margins in the large states and winning by large majorities in the small states. This is what happened in 2000 when George W. Bush lost the popular vote by more than 500,000 but won the electoral vote 271 to 266.

In addition to the previously mentioned elections, there have been a number of close calls in the 20th century—when the switch of a relatively small number of votes in key states could have put the election in the House or have changed the outcome of the election: 1948, 1960, 1968, and 1976.²⁷

PROPOSALS TO CHANGE THE ELECTORAL COLLEGE SYSTEM

Over the years, there have been many proposals to reform the Electoral College system, some proposing relatively minor changes, some proposing a constitutional amendment to provide for the direct popular election of the president. The “automatic plan” would eliminate the problem of the faithless elector by automatically casting each state’s electoral votes in favor of the candidate who won the plurality of popular votes in the state. There would be no individual electors to cast ballots and thus no opportunity for a vote to be cast in an unexpected direction. It would take a constitutional amendment to make such a change.²⁸

The “district plan” would give one electoral vote to the candidate who won a plurality of votes in each congressional district within a state. The extra two electoral votes would be granted to the candidate who won the most popular votes in the state as a whole. Because state legislatures now can decide how electoral votes are to be determined, this change could be made by individual states. In fact, Maine (with four electoral votes) and Nebraska (with five electoral votes) have adopted the district approach. Most states, however, have judged that their own influence is maximized by casting their electoral ballots in a block and follow the “unit rule” (winner-take-all) approach. Thus, it is improbable that most states would adopt the district approach on a voluntary basis. The district plan would make the outcome of the Electoral College vote more closely mirror the popular vote, but it would not entirely eliminate the possibility of the runner-up becoming president.

The “national bonus” plan would grant a bonus of 102 electoral votes (two for each state plus the District of Columbia) to the candidate who wins the most popular votes, providing the winner has at least 40 percent of the vote. This approach would virtually eliminate the possibility that the runner-up in the popular vote would become president while at the same time, preserving the distribution of electoral votes by states (though in a diluted form).²⁹ Arthur Schlesinger, Jr. endorsed the national bonus plan and was a member of a Twentieth Century Fund Task Force that proposed its adoption in 1978. According to Schlesinger, the plan “would preserve both the constitutional and the practical role of the states in the presidential election process.”³⁰

But by far the most basic and important proposal to change the Electoral College system is the proposal to amend the Constitution to provide for the direct popular election of the president. A version of this plan that was considered by Congress from 1966 to 1979 provided that “The people . . . shall elect the President.” The person “having the greatest number of votes shall be elected President.” . . . If neither slate of president and vice presidential candidates wins

40 percent of the vote, a runoff election would be held between the top two vote-getting teams of candidates.³¹ After hearings in Congress, the proposed Constitutional amendment was passed by the House in 1969 by 339 to 70. Hearings in the Senate were held over the next 10 years, and in 1979, the Senate voted 51 to 48 in favor of sending the proposal to the states for ratification, well short of the two-thirds majority necessary to pass a constitutional amendment.³²

DEFENSE OF THE ELECTORAL COLLEGE AND OBJECTIONS TO CHANGE

The defense of the Electoral College system of electing the president is not based on the intent of the Framers. Their intention was to devise a compromise that would satisfy a number of different constituencies needed to ratify the Constitution, primarily the small states and the slave states. One of the most vigorous defenders of the Electoral College system, Judith Best, admits that “the Electoral College has not worked as the framers anticipated.” . . . And she even favors putting the unit rule (winner-take-all) in the Constitution, because it protects federalism.³³

The strongest defense of the Electoral College system lies in the effect of the system on the constitutional structure in practice over two centuries. The constitutional defense of the Electoral College system emphasizes how federalism might be affected by any change. The political defense of the system stresses the importance of the two-party system to political stability and the ways the direct popular vote might imperil the two-party system. Opponents of change also predict that in addition to splintering the party system, a direct popular vote approach would lead to disruptive recounts and challenged elections.

Federalism

The strongest constitutional argument against direct popular election is that it would undermine the federal nature of our government. Judith Best argues that direct popular election would “deform our Constitution” and would constitute a serious “implicit attack on the federal principle.”³⁴ William C. Kimberling argues that national popular election “would strike at the very heart of the federal structure laid out in our Constitution and would lead to the nationalization of our central government—to the detriment of the States.”³⁵

By guaranteeing a specific number of electoral votes to each state, the Electoral College system ensures that presidential candidates must appeal to coalitions of voters that are widely distributed throughout the country. If the federal requirement were not there, candidates might appeal to regional clusters of voters whose votes could be aggregated across states and regions. This could potentially be divisive and lead to discord. This argument for the Electoral College depends in great part on the fact that states have individually adopted the unit rule of counting all of their electoral votes as a block. That is why Best would put the unit rule in the Constitution and why Wilmerding was against it.³⁶

Proponents of direct popular vote argue that federalism is indeed an important component of the constitutional system, but that the Electoral College system is not crucial to its maintenance. Certainly the electoral votes of small states do not attract active campaigning by major party candidates, who tend to go where there are large blocks of electoral votes. More importantly, larger states will be contested only if there is a reasonable chance of their blocks of votes going either way. With direct popular election, all votes would count for candidates, and they would be less likely to write off many states merely because they could not win the plurality in that state. They also argue that federalism is well protected by members of the House and Senate as well as by the legislatures and governors of the states. In the words of constitutional historian Jack Rakove, "States have no interest, as states, in the election of a president, only citizens do, and the vote of a citizen in Coeur d'Alene should count equally with one in Detroit."³⁷

The Two-Party System

Defenders of the Electoral College system also argue that it is one of the key bulwarks of the two-party system in the United States and that direct popular voting for president would lead to the splintering of the two-party system and a proliferation of minor parties. They argue that minor political factions will have an incentive to run candidates for president with the hope that they will be able to force a runoff election and extract concessions in return for their support. Judith Best argues that "It is the very existence of a popular vote runoff, a second chance provision, that tempts more candidates to enter and voters to cast what they would otherwise consider to be a protest vote—a 'send them a message' vote."³⁸

The hope of these minor parties would be to attract enough votes, along with other splinter parties, to prevent either of the two-party candidates from winning 40 percent of the vote and thus force a runoff. Best argues, for example, that if the 40 percent runoff rule had been in effect in 1992, Ross Perot would not have temporarily withdrawn from the race and could have offered his support in a runoff to one of the candidates for policy concessions.³⁹ Arthur Schlesinger, Jr. argued that direct popular election "would hasten the disintegration of the party system. Direct election with a runoff would give single-issue movements, major-party dissidents and freelance media adventurers an unprecedented incentive to jump into presidential contests." These parties would "... extract concessions from the runoff candidates in exchange for promises of support."⁴⁰

Proponents of direct popular vote argue that, in addition to our political culture, the real structural basis for our two-party system is the use of single-member districts (plurality wins or first-past-the-post) for representation in Congress. It is difficult to build a viable political party if there is little chance of electing government officials. Proportional representation systems for parliamentary elections encourage smaller parties to form because they can realistically win public office. In a presidential election, the probability of winning enough popular votes to force a runoff, even in conjunction with other minor parties, is low. The present system does not prevent many minor party candidates from qualifying for inclusion on ballots in many states. Nor does it prevent significant candidates from running, such as Theodore Roosevelt or Ross Perot.

In a popular election system, even if one minor party were able to win a significant portion of the vote, and there were a runoff election, how could the leaders of that party force their voters to vote for the person with whom the candidate made a deal? In the present system, however, electors are chosen by the party (or candidate) on the basis of loyalty. With the Electoral College, if a candidate, for example, Ross Perot, were able to win sufficient electoral votes to produce a majority for another candidate in the Electoral College, the candidate would have much more leverage in convincing his few loyalists on his slates of electors to vote for whom he chose in the Electoral College vote than a candidate would have in convincing millions of voters to vote one way or another in a runoff election. Thus, a third party forcing concessions on one of the major parties is more likely in the Electoral College system than in a popular election with a runoff provision.

Contested Elections

Another argument critics of the direct popular vote plan make is that it would lead to endless recounts and challenges. Best argues that it would remove “the quarantine on fraud and recounts.”⁴¹ The reasoning is that if the election were close or the 40-percent threshold was in doubt, challenges and contests would not be limited to one or a few states but would be undertaken throughout the country: “. . . a recount of every ballot box in the country could be necessary.” . . .⁴² In the election of 2000, some commentators raised the specter that *if you think that what is happening during the recounts in Florida is complicated, if we had direct popular elections, this would be happening throughout the whole country.*

But one of the attractions of direct popular election is that recounts would be less likely. In order to undertake a recount, there has to be the reasonable possibility that enough incorrect or fraudulent votes can be found to change the election outcome. It is intuitively evident that the fewer the total votes involved, the more likely it is that a close contest may result in a small number of votes deciding the election. Thus, in the present system, a few votes in one state may be able to make the difference in swinging a large block of electoral votes and possibly decide the election. This is what happened in Florida in the 2000 presidential election; the election was so close that the swing of a few hundred votes might realistically have changed the election outcome. Thus, a recount had a plausible possibility of changing the election outcome.

In Florida, Al Gore had to find several hundred votes in order to change the outcome. If the election had been by popular vote, George Bush would have had to find more than 500,000 votes, a daunting task. Even in 1960, when Richard Nixon’s supporters were pondering challenges in Illinois, they would have had to find about 9,000 votes to change the outcome. And if they had finally won Illinois, they would have had to find about 40,000 votes in Texas. Because winning both of these states through recounts was unlikely, Nixon’s supporters gave up. It would have been even harder to find more than 100,000 votes throughout the country, if the popular vote determined the outcome. Thus, the argument of those supporting direct popular voting for president is that recounts and challenges would be less likely, not more likely,

because the number of votes needed to change a national outcome would be much larger than the number needed to change the outcome in one state that controlled a large or deciding block of electoral votes.

CONCLUSION

The question of how we elect our president is a fundamental one in the constitutional system, and it has been debated many times over the past two centuries. It has not been fully settled, just as the important constitutional issues of the right balance between the president and Congress or the balance between the states and the national government have not been finally settled. The presidential election of 2000, with the runner-up becoming president, has raised the issue again. Without prejudging the outcome, it is appropriate to begin a national dialogue and to deliberate about the best mode for electing the president.

ACKNOWLEDGMENTS

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ENDNOTES

1. Richard J. Ellis, *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), p. 114. The Federalists had arranged to withhold several votes from Adams's vice presidential candidate, Thomas Pinckney, so that there would be no tie between Adams and Pinckney. But they miscalculated and withheld too many, giving Thomas Jefferson the second most number of electoral votes and the vice presidency.
2. See Shlomo Slonim, "Designing the Electoral College," in Thomas E. Cronin, ed. *Inventing the American Presidency* (Lawrence, KS: University Press of Kansas, 1989), p. 33. First published as "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for Selection of a President," *Journal of American History*, Vol. 73 (June 1986).
3. American Bar Association, *Electing the President: A Report of the Commission on Electoral College Reform* (Chicago: American Bar Association, 1967), p. 3.
4. The forthcoming election of 1804 was also on the minds of those who supported the Twelfth Amendment. See Lucius Wilmerding, Jr. *The Electoral College* (Boston: Beacon Press, 1958), p. 38.
5. The voting data in these elections are from Joseph Nathan Kane, *Presidential Fact Book* (NY: Random House, 1999).
6. For data on these close elections see Neal R. Peirce and Lawrence D. Longley, *The People's President* (New Haven, CT: Yale University Press, 1981), pp. 257–258.
7. The voting results were reported in *The New York Times*, December 30, 2000, p. A11. Other candidates: Ralph Nader, 2,864,810 (2.72%); Pat Buchanan, 448,750 (.43%); Harry Brown, 386,024 (.37%); *The Washington Post* (December 21, 2000), p. A9.
8. It is a historical oddity that every time the son or grandson of a president has been nominated for president, he has been elected with fewer popular votes than his opponent. In 1824, John Quincy Adams, the son of John Adams, was elected by the House. In 1888, Benjamin Harrison, grandson of William Henry Harrison, won the electoral vote, but came in second to Grover Cleveland in the popular count. George Bush is the third son or grandson of a president to be elected, again with fewer popular votes than his opponent.

9. See Shlomo Slonim, "Designing the Electoral College," in Thomas E. Cronin, ed. *Inventing the American Presidency* (Lawrence, KS: University Press of Kansas, 1989), pp. 33–60. First published as "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for Selection of a President," *Journal of American History*, Vol. 73 (June 1986).
10. Slonim, "Designing the Electoral College," p. 45.
11. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), Vol. 2, p. 171.
12. Slonim, "Designing the Electoral College," pp. 48–49.
13. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), Vol. I, p. 69 (June 1, 1787).
14. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), Vol. II, p. 31 (July 17, 1787).
15. Richard J. Ellis, ed. *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), p. 113.
16. Farrand, *Records of the Federal Convention of 1787*, Vol. 2, pp. 56–57.
17. Slonim, "Designing the Electoral College," p. 50.
18. Slonim, "Designing the Electoral College," p. 55.
19. Wilmerding, *The Electoral College*, p. 21.
20. Arthur Schlesinger, Jr., "Fixing the Electoral College," *The Washington Post* (December 19, 2000), p. A39. In his first annual address, President Andrew Jackson argued: "that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. . . . It is safer for them to express their own will. . . . A President elected by a minority cannot enjoy the confidence necessary to the successful discharge of his duties." Quoted in Arthur Schlesinger, Jr., *The Cycles of American History* (Boston: Houghton Mifflin, 1986), p. 318.
21. Richard J. Ellis, ed. *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), pp. 118–119.
22. William C. Kimberling in "The Electoral College," argues that "Indeed, if we become obsessed with government by popular majority as the only consideration, should we not abolish the Senate which represents states regardless of population? . . . If there are any reasons to maintain State representation in the Senate and House as they exist today, then surely these same reasons apply to the choice of president. Why, then, apply a sentimental attachment to popular majorities only to the Electoral College?" The reason for state representation in the House and Senate is that each body is intended to represent citizens in local or state areas. The basis for electing the president by national vote is that the president is supposed to represent the nation rather than only one part of it. Kimberling's article is found on the National Archives and Records Administration Web site (www.nara.gov).
23. Another way to calculate differential influence of voters on the Electoral College vote is to divide the number of electoral votes by all of those who voted for the winner in each state (because the votes of those voting for the loser in a state do not count for that candidate at all). See Adam Clymer, "Now What? This Time, Cries For 'Blood' Seem Unthinkable," *The New York Times* (November 12, 2000), p. wk 5. See also the analysis of Lawrence D. Longley and Neal R. Peirce in *The Electoral College Primer* (New Haven, CT: Yale University Press, 1996), pp. 143–144.
24. George F. Will, "A Brief Moment," *The Washington Post* (December 17, 2000), p. B7. If questions about how a possible change in the Electoral College system might change campaign patterns are of concern, some empirical evidence can be brought to bear. Patterns of campaign activity in recent elections can be measured. For example, in the 2000 election, eight mountain states received no visits by candidates; all of them had few electoral votes and all were solidly Republican. The number of presidential campaign ads in Green Bay (WI) and Grand Rapids (MI) far outnumbered (by more than 5,000) the ads in the New York City or Los Angeles media markets. To win candidates' attention, states must be "in play" and have a significant number of electoral votes. For data on candidate state visits and media market ads, see Alexis Simendinger, James A. Barnes, and Carl M. Cannon, "Pending a Popular Vote," *National Journal* (November 18, 2000), p. 3653.
25. Joseph Nathan Kane, *Presidential Fact Book* (NY: Random House, 1999), p. 374.
26. National Archives and Record Administration, Web site: www.nara.gov.

27. For details and specific numbers of votes that would have to change in order to change the outcome in these elections, see Lawrence D. Longley and Neal R. Peirce, *The Electoral College Primer* (New Haven, CT: Yale University Press, 1996), pp. 35–36.
28. The Center for the Study of the Presidency sponsored a panel that issued a report in 1992 that recommended a version of the automatic plan that would have eliminated the office of elector. The panel also recommended that if there were no majority in the electoral vote that there be a runoff election rather than letting the House of Representatives decide. See Elizabeth P. McCaughey, “Electing the President: Report of the Panel on Presidential Selection,” Center for the Study of the Presidency, 1992. Ronald Reagan, in a talk on April 13, 1977, also proposed casting votes automatically rather than giving any discretion to electors. See William Safire, “Reagan Writes,” *The New York Times Magazine* (December 31, 2000), p. 38.
29. See Thomas E. Cronin, “The Electoral College Controversy,” in Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. xxi–xxiv.
30. See “Winner Take All: Report of the Twentieth Century Fund Task Force on Reform of the Presidential Election Process,” (NY, 1978). See Schlesinger’s analysis of the national bonus plan in *The Cycles of American History* (Boston: Houghton Mifflin, 1986), pp. 320–321.
31. The proposed Amendment is reprinted in Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. 115–117. The legitimacy of a president who wins the election with less than 50 percent of the vote is not a problem. Seventeen presidential elections have resulted in such a “minority president” (Grover Cleveland and Bill Clinton two times each). Only Lincoln polled slightly less than 40 percent. The lack of a majority of the popular votes did not prevent some of these minority presidents being reelected, including Lincoln, Cleveland, Wilson, Nixon, and Clinton.
32. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 83.
33. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), pp. 84 and 14.
34. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 55.
35. William C. Kimberling, “The Electoral College,” on the National Archives and Records Administration Web site (www.nara.gov). Kimberling was Deputy Director of the Federal Election Commission Office of Election Administration in 2000.
36. Best, *The Choice of the People?* p. 14. Wilmerding, *The Electoral College*: “In committing the appointment of the Electors to the people, the state legislatures have fulfilled the intention of the Constitution; but in requiring the Electors to be appointed by a mode which gives to a single party the whole of a state’s representation in the Electoral College, they have defeated that intention. They have put the presidency on a federative rather than a national basis. They have taken the choice of the President from the people of the nation at large and given it, in effect, to the people of the large states.” (p. xi).
37. Jack Rakove, “The Accidental Electors,” *The New York Times* (December 19, 2000), p. A31.
38. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 56. This objection also applies to proposals for an “instant runoff” in which voters would vote for several candidates in order of preference. If no candidate receives 40 percent of the votes on the first round, the candidate with the least votes would be dropped from the calculations in an iterative fashion until one candidate received the 40 percent requirement.
39. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 56.
40. Schlesinger, *The Cycles of American History*, pp. 319–320.
41. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 57.
42. Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996), p. 58.

Historical Perspectives on the Presidency

Because Article II of the Constitution left many blank spaces to be filled in by the workings of history, the views of successive presidents naturally comprise important extensions, and even emendations, of the constitutional text. The contributions of the first president, George Washington, cannot be understated. As noted in Section 1, his character and fame were essential to the success of the Constitutional Convention, and his talents framed a model for the document's list of presidential powers.

Despite the fact that he was twice the unanimous choice of the Electoral College, Washington served out of a sense of duty rather than a desire for greater fame. Washington “never ran for the presidency,” writes Joel Achenbach in his study of Washington’s role in westward expansion. “He ran *from* it. The job stalked him from the moment the Framers conceived it.”¹ Yet he gave the job much-needed purpose and dignity, and he remained in office long enough to establish certain precedents—in conducting foreign affairs, and in dealing with cabinet members and Congress. At the end of two terms, moreover, he gratefully retired to his beloved Mount Vernon estate—setting the example of an orderly transfer of power.

As he left office, Washington prepared a farewell address containing thoughts about his nation’s condition and advice to his countrymen. Although still read dutifully in the chambers of Congress every year on Washington’s birthday, the document is very much the work of a literate 18th-century gentleman—alas, lacking the directness of expression that graces the writings of, say, Thomas Jefferson or the authors of *The Federalist Papers*. After thanking citizens for the honors bestowed on him, he extols the virtues of liberty and union: “[Y]our union ought to be considered as a main prop to your liberty, and . . . love of the one ought to endear to you the preservation of the other.”² (He presciently observes in this context that citizens should avoid “overgrown military establishments, which under any form of government are inauspicious to liberty, and which are . . . particularly hostile to republican liberty.”)³ He further extols the constitutional machinery:

. . . [R]emember, especially, that for the efficient management of your common interests, in a country so extensive as ours, a government of as

much vigor as is consistent with the perfect security of liberty is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian.⁴

Finally, Washington takes pains to warn his countrymen of two dangers that had bedeviled his presidency: the “common and continual mischiefs of the spirit of party” and “the insidious wiles of foreign influence.” Despite his fame and public esteem, Washington was often assaulted by vicious attacks from anti-Federalists, who in time rallied around Thomas Jefferson. Partisan spirit may be useful in monarchies, he writes; but it should be discouraged in popular, elective governments:

From their natural tendency, it is certain there will always be enough of that [partisan] spirit for every salutary purpose. And there being constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it. A thirst not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming it should consume.⁵

As for foreign influence, Washington declared that

The great rule of conduct for us, in regard to foreign nations is in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled, with perfect good faith. Here let us stop. . . .

’Tis our true policy to steer clear of permanent alliances, with any portion of the foreign world. . . . Taking care always to keep ourselves, by suitable establishments, on a respectably defense posture, we may safely trust to temporary alliances for extraordinary emergencies.⁶

This section offers several notable presidential statements about the powers of the office—in logical progression rather than chronological order. This section closes with a distinguished scholar’s categorization of presidents’ approaches to the office in light of the political environment within which they work.

Historically, many presidents have taken a restrictive view of their duties. “I shall have no policy of my own to interfere with the people,” declared Ulysses S. Grant upon accepting the Republican nomination for president in 1868. In other words, Grant would defer to the Congress—controlled by his own party. This view was perhaps best expressed by an early 20th-century president, William Howard Taft, who served from 1909 to 1913. (Taft’s true ambition was fulfilled in 1921, when President Warren G. Harding appointed him Chief Justice of the Supreme Court, where Taft served until his death in 1930—the only person to have served in both posts.) Three years after being defeated for reelection, Taft reflected on the presidency in a series of lectures that he entitled *Our Chief Magistrate and His Powers*. He held a narrowly literal, or Whig, view of the office; that is, he counseled strict deference to the text of the Constitution and specific laws passed by Congress. “The true view of the executive functions,” he declared, is that “the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.” He dismissed more

expansive claims, such as Theodore Roosevelt's "stewardship theory," as "unsafe." Taft concluded that "there is no undefined residuum of power which [the president] can exercise because it seems to be in the public interest."

A more ambitious view of the presidency—as a servant or steward directly responsible to the people—has often been used to explain or justify presidential actions. Andrew Jackson (1829–1837), touted as a "man of the people," tailored many of his crucial actions to cultivate mass support. It was, however, Theodore Roosevelt (1901–1909) who best articulated what he called the "stewardship theory" in explaining his actions as president. A student of history, Roosevelt wanted to be a great president and had a clear vision of how such a president should behave. He tried to model himself on presidents like Washington and especially Lincoln; he had nothing but scorn for "honorable and well-meaning" predecessors (and, as it turned out, his chosen successor William Howard Taft), who took the "narrowly legalistic view that the president is the servant of Congress rather than of the people."

As president, Roosevelt acted with vigor, boldness, and a shrewd understanding of public sentiment and media influence. In domestic policy, he is best remembered for his attacks against the giant business trusts ("malefactors of great wealth," he called them) and support for conserving public and private lands. He bargained incessantly with congressional leaders, but when he encountered fierce opposition, he appealed to public opinion and often won his way. In foreign affairs, he pushed executive power toward its limits, although he consulted Congress when legally obliged to do so. Roosevelt took advantage of political instability in Central America to gain access to the Isthmus of Panama and build the Panama Canal, settled the Alaskan boundary dispute on his own terms, sent the battleship fleet around the world to impress other naval powers, and intervened vigorously in the Russo-Japanese War (for which he received the Nobel Peace Prize).

In his autobiography published in 1913, Roosevelt explained that he "acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition." His activism was matched by the vigor and directness of his writing:

I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare. . . . I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.

Another activist view of presidential powers was provided by Woodrow Wilson (1913–1921). Trained in both law and politics/history/economics, Wilson received his PhD from Johns Hopkins University in 1885 and became one of the founders of the modern scholarly discipline of political science. His dissertation, published as *Congressional Government* (1885), described critically the post-Civil War "Gilded Age" of congressional dominance and presidential weakness—not to mention corruption and influence peddling. "Congress [is] the dominant, nay, the irresistible, power of the federal system," whereas "the president [is] the first official of a carefully graded and impartially

regulated civil service system . . . and his duties call rather for training than for constructive genius.”

More than 20 years later, Wilson, by this time the president of Princeton University and about to become governor of New Jersey, delivered a series of lectures in which he articulated a radically different view of the presidency. Wilson’s newfound fascination with the office no doubt reflected his assessment of the popular administrations of William McKinley and Theodore Roosevelt. Wilson’s ideal president was an inspired, even heroic leader of public opinion, not simply Roosevelt’s steward, who embodies or interprets popular sentiment. His now-famous phrases are a manifesto for the modern public, or “rhetorical,” presidency. “He is the only national voice in affairs. . . . His office is anything he has the sagacity and force to make it.” Six years after writing these words, Wilson himself was elected president—the only political scientist, and the only person with an earned doctorate, to reach that post. One inevitably compares Wilson’s ringing phrases with his subsequent performance in the Oval Office—the triumphs of his New Freedom domestic agenda (1913–1916) and victory in the World War I, the “Great War” (1917–1918), followed by the final, tragic defeat of his cherished League of Nations plan for a world order (1919).

The most expansive view of presidential powers—embracing a prerogative to act to preserve the Constitution itself, even if that means bending or breaking specific written laws—was expressed by Abraham Lincoln (1861–1865). Lincoln’s invocation of the prerogative power came in response to the most profound crisis in the nation’s history: the secession of the Confederacy, with its very real threat of tearing the nation apart.

Such a broad reading of executive power, to be sure, had been claimed even by thinkers normally suspicious of executive authority. Most European advocates of parliamentary supremacy, for example, conceded the existence of a realm of royal prerogative, usually associated with diplomacy and military command. Readers of John Locke’s *Second Treatise on Government* may well be startled when they reach Chapter 14, on “prerogative power,” which he defined as “the power to act according to discretion for the public good, without the prescription of the law and sometimes even against it.”⁷ Why should leaders have such discretion in executing the law? Legislators simply cannot foresee every possible eventuality, Locke explains; written laws therefore often fail to give adequate guidance. Presumably, Locke was thinking about crises or emergencies that imperil the safety of the entire community. “[T]he laws themselves should in some cases give way to the executive power—or rather, to the fundamental law of nature [that] all the members of the society are to be preserved.”⁸ Not that such power is unchecked. Ultimately, it is subject to the people’s will, and it may be protested in the usual ways. It remains significant, however, that Locke—the great champion of legislative power and a “balanced constitution”—condones such a broad reading of executive power.

An orthodox Whig during his early career (serving in the 30th Congress, 1847–1849), Lincoln had denounced Andrew Jackson’s vigorous use of presidential power. “Were I president,” Lincoln said, “I should desire the legislation

of the country to rest with Congress, uninfluenced by the executive . . . and undisturbed by the veto unless in very special and clear cases.” Confronting the extraordinary circumstances of civil strife in the spring of 1861, however, Lincoln took bold, unprecedented actions. Among other things, he augmented the armed forces, both regulars and volunteers; he spent funds that Congress had not appropriated; he proclaimed a blockade of southern ports; he proclaimed martial law and suspended the writ of habeas corpus in selected places; and he imposed a wide variety of wartime restrictions. Many of his actions invaded subjects previously considered as the domain solely of Congress. Nor was Lincoln in any hurry to seek legislative ratification of his actions (although Congress eventually approved most of them). “Whether strictly legal or not,” he explained, “[my actions] were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them.”

Lincoln justified his actions in terms that Locke might well have understood: Ultimately, they were needed to preserve the nation itself. His was a unique reading of the Constitution’s injunction that presidents shall “take care that the laws be faithfully executed”: here “the laws” were nothing less than the supreme law of the land: the Constitution itself and the “more perfect Union” it had created. As Lincoln later asked, “Was it possible to lose the nation and yet preserve the Constitution?” And again: “Was it possible for all the laws *except one* to be preserved?” In his letter to Albert G. Hodges, dated April 4, 1864, Lincoln defended his use of presidential power in the simple eloquence that seemingly flowed naturally from his pen.

Lincoln nonetheless drew a bright line between his personal moral sentiments and his public duties. His career had been built upon his opposition to slavery (“If slavery is not wrong, nothing is wrong”). But his oath of office bound him to a public morality: preservation of the union, with or without slavery. “. . . I have never understood that the presidency conferred upon me an unrestricted right to act officially upon [my] judgment and feeling,” he writes. Thus, he temporized about the issue of abolishing slavery: Having already alienated the slave-holding states, he now angered the Civil War’s most fervent supporters, especially the abolitionists. His Emancipation Proclamation—a limited grant of freedom to slaves residing outside the rebellious states—came only after battlefield victories made his words credible. Lincoln’s subtle but powerful argument speaks to today’s elected officials, who are often challenged to choose between their personal ethical views and their responsibilities in public office—and which may call for a distinct loyalty to what might be called a public morality.

The final essay in this section, Stephen Skowronek’s “The Presidency in the Political Order,” is a bold attempt to classify presidential roles in their historical contexts. Skowronek plants himself right in the middle of the Oval Office: Political history, he argues, is defined in terms of “presidentially driven sequences of change encompassing the generation and degeneration of coalitional systems or partisan regimes.” He describes how presidents “make politics” by tirelessly building constituencies for change and striving to remove obstacles that stand in the way of their high-priority projects.

Presidents' varying roles—what Skowronek calls the “emergent structures” of presidential policymaking—depend on whether a president challenges or adheres to the prevailing political order. When presidents oppose an established but discredited political order, they are free to strike out in new directions (Skowronek’s “politics of reconstruction”). “Presidents stand preeminent in American politics when government has been most thoroughly discredited, and when political resistance to the presidency is weakest, presidents tend to remake the government wholesale.” Jackson, Lincoln, and Franklin Roosevelt are among the great reconstructive presidents. In contrast, those presidents who cling to a mode of politics that has lost its usefulness and credibility (the “politics of disjunction”) are doomed, and often singled out as political failures. Examples are the two Adamsses (John and John Quincy), James Buchanan, Herbert Hoover, and Jimmy Carter.

Presidents who inherit an established, robust political tradition are fortunate: their task is to articulate the basic themes of the prevailing ideology—acting as “regime boosters”—and innovate within that consensus (the “politics of articulation”). Presidents such as James K. Polk, Theodore Roosevelt, and Lyndon Johnson “came to power in the wake of a strong reaffirmation of majority party government, and no extraordinary crises distracted them from the business of completing the agenda.” But such presidents are at risk when they face unexpected events (the Vietnam War, in Johnson’s case) that shake the partisan consensus that swept them into office.

Finally, there are presidents who attain their office despite the fact that they oppose the political consensus of their era (“politics of preemption”). They are political “flukes.” Their election defies the prevailing partisan divisions, and often they must deal with Congresses controlled by the opposition party. Examples include Andrew Johnson, Woodrow Wilson, and Richard Nixon. Despite their activities (even their successes), these presidents failed to alter the underlying political allegiances, and many times were brought to their knees by Congresses controlled by their enemies.

Skowronek’s analysis reminds us once again that the presidential job description is expansive and variable. It is a blend of the president’s own political commitments and the tenor of the times. Out of this mix emerge some presidents who are deemed great, and others who are judged as failures.

SELECTED BIBLIOGRAPHY

- Agar, Herbert, *The Price of Union* (Boston, MA: Houghton Mifflin, 1950).
- Ford, Henry Jones, *The Rise and Growth of American Politics* (New York: Da Capo Press, 1967). Originally published by Macmillan in 1898.
- Greenstein, Fred I., *The Presidential Difference: Leadership Style from FDR to George W. Bush* (New York: Free Press, 2000).
- Skowronek, Stephen, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, MA: Harvard University Press, 1993).
- Skowronek, Stephen, *Presidential Leadership in Political Time*, 2nd ed. (Lawrence, KS: University Press of Kansas, 2011).
- Wilson, Woodrow, *Congressional Government* (Baltimore, MD: Johns Hopkins University Press, 1981). Originally published in 1885.
- Wilson, Woodrow, *Constitutional Government in the United States* (New York: Columbia University Press, 1961). Originally published in 1908.

ENDNOTES

1. Joel Achenbach, *The Grand Idea: George Washington's Potomac and the Race to the West* (New York: Simon & Schuster, 2004), 157.
2. *Washington: Writings*, ed. John Rhodehamel, The Library of America (New York: Penguin Books, 1997), 966. All quotations from the farewell address are drawn from this volume, 962–977.
3. Ibid.
4. Ibid., 969.
5. Ibid., 970.
6. Ibid., 974–975.
7. John Locke, *The Second Treatise of Government*, ed. Thomas P. Peardon (Indianapolis, IN: The Library of Liberal Arts / Bobbs-Merrill, 1952), p. 93.
8. Ibid., 91.

Reading 6

The Strict Constructionist Presidency

WILLIAM HOWARD TAFT

While it is important to mark out the exclusive field of jurisdiction of each branch of the government, Legislative, Executive and Judicial, it should be said that in the proper working of the government there must be cooperation of all branches, and without a willingness of each branch to perform its function, there will follow a hopeless obstruction to the progress of the whole government. Neither branch can compel the other to affirmative action, and each branch can greatly hinder the other in the attainment of the object of its activities and the exercise of its discretion.

The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist. There have not been wanting, however, eminent men in high public office holding a different view and who have insisted upon the necessity for an undefined residuum of Executive power in the public interest. They have not been confined to the present generation. We may learn this from the complaint of a Virginia statesman, Abel P. Upshur, a strict constructionist of the old school, who succeeded Daniel Webster as Secretary of State under President Tyler. He was aroused by Story's commentaries on the Constitution to write a monograph answering and criticizing them, and in the course of this he comments as follows on the Executive power under the Constitution:

The most defective part of the Constitution beyond all question, is that which is related to the Executive Department. It is impossible to read that instrument, without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the Constitution, are, perhaps, as precise and strict as they could safely have been made; but in regard to the Executive, the Convention appears to have studiously selected such loose and general expressions, as

would enable the President, by implication and construction either to neglect his duties or to enlarge his powers. *We have heard it gravely asserted in Congress that whatever power is neither legislative nor judiciary, is of course executive, and, as such, belongs to the President under the Constitution.* How far a majority of that body would have sustained a doctrine so monstrous, and so utterly at war with the whole genius of our government, it is impossible to say, but this, at least, we know, that it met with no rebuke from those who supported the particular act of Executive power, in defense of which it was urged. Be this as it may, it is a reproach to the Constitution that the Executive trust is so ill-defined, as to leave any plausible pretense even to the insane zeal of party devotion, for attributing to the President of the United States the powers of a despot; powers which are wholly unknown in any limited monarchy in the world.

The view that he takes as a result of the loose language defining the Executive powers seems exaggerated. But one must agree with him in his condemnation of the view of the Executive power which he says was advanced in Congress. In recent years there has been put forward a similar view by executive officials and to some extent acted on. Men who are not such strict constructionists of the Constitution as Mr. Upshur may well feel real concern if such views are to receive the general acquiescence. Mr. Garfield, when Secretary of the Interior, under Mr. Roosevelt, in his final report to Congress in reference to the power of the Executive over the public domain, said:

Full power under the Constitution was vested in the Executive Branch of the Government and the extent to which that power may be exercised is governed wholly by the discretion of the Executive unless any specific act has been prohibited either by the Constitution or by legislation.

In pursuance of this principle, Mr. Garfield, under an act for the reclamation of arid land by irrigation, which authorized him to make contracts for irrigation works and incur liability equal to the amount on deposit in the Reclamation Fund, made contracts with associations of settlers by which it was agreed that if these settlers would advance money and work, they might receive certificates from the government engineers of the labor and money furnished by them, and that such certificates might be received in the future in the discharge of their legal obligations to the government for water rent and other things under the statute. It became necessary for the succeeding administration to pass on the validity of these government certificates. They were held by Attorney-General Wickersham to be illegal, on the ground that no authority existed for their issuance. He relied on the Floyd acceptances in 7th Wallace, in which recovery was sought in the Court of Claims on commercial paper in the form of acceptances signed by Mr. Floyd when Secretary of War and delivered to certain contractors. The Court held that they were void because the Secretary of War had no statutory authority to issue them. Mr. Justice Miller, in deciding the case, said:

The answer which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law,

constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.

My judgment is that the view of Mr. Garfield and Mr. Roosevelt, ascribing an undefined residuum of power to the President is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right. The mainspring of such a view is that the Executive is charged with responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden not to do it. The wide field of action that this would give to the Executive one can hardly limit.

Reading 7

The Stewardship Presidency

THEODORE ROOSEVELT

My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. . . .

The course I followed, of regarding the Executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln. Other honorable and well-meaning Presidents, such as James Buchanan, took the opposite and, as it seems to me, narrowly legalistic view that the President is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action. Most able lawyers who are past middle age take this view, and so do large numbers of well-meaning, respectable citizens. My successor in office took this, the Buchanan, view of the President's powers and duties.

For example, under my administration we found that one of the favorite methods adopted by the men desirous of stealing the public domain was to carry the decision of the secretary of the interior into court. By vigorously opposing such action, and only by so doing, we were able to carry out the policy of properly protecting the public domain. My successor not only took the opposite view, but recommended to Congress the passage of a bill which would have given the courts direct appellate power over the secretary of the interior in these land matters. . . . Fortunately, Congress declined to pass the bill. Its passage would have been a veritable calamity.

I acted on the theory that the President could at any time in his discretion withdraw from entry any of the public lands of the United States and reserve the same for forestry, for water-power sites, for irrigation, and other public purposes. Without such action it would have been impossible to stop the activity of the land-thieves. No one ventured to test its legality by lawsuit. My successor, however, himself questioned it, and referred the matter to Congress. Again Congress showed its wisdom by passing a law which gave the President the power which he had long exercised, and of which my successor had shorn himself.

Perhaps the sharp difference between what may be called the Lincoln-Jackson and the Buchanan-Taft schools, in their views of the power and duties of the President, may be best illustrated by comparing the attitude of my successor toward his Secretary of the Interior, Mr. Ballinger, when the latter was accused of gross misconduct in office, with my attitude toward my chiefs of department and other subordinate officers. More than once while I was President my officials were attacked by Congress, generally because these officials did their duty well and fearlessly. In every such case I stood by the official and refused to recognize the right of Congress to interfere with me excepting by impeachment or in other constitutional manner. On the other hand, wherever I found the officer unfit for his position, I promptly removed him, even although the most influential men in Congress fought for his retention. The Jackson-Lincoln view is that a President who is fit to do good work should be able to form his own judgment as to his own subordinates, and above all, of the subordinates standing highest and in closest and most intimate touch with him. My secretaries and their subordinates were responsible to me, and I

accepted the responsibility for all their deeds. As long as they were satisfactory to me I stood by them against every critic or assailant, within or without Congress; and as for getting Congress to make up my mind for me about them, the thought would have been inconceivable to me. My successor took the opposite, or Buchanan, view when he permitted and requested Congress to pass judgment on the charges made against Mr. Ballinger as an executive officer. These charges were made to the President; the President had the facts before him and could get at them at any time, and he alone had power to act if the charges were true. However, he permitted and requested Congress to investigate Mr. Ballinger. The party minority of the committee that investigated him, and one member of the majority, declared that the charges were well-founded and that Mr. Ballinger should be removed. The other members of the majority declared the charges ill-founded. The President abode by the view of the majority. Of course believers in the Jackson-Lincoln theory of the presidency would not be content with this town meeting majority and minority method of determining by another branch of the government what it seems the especial duty of the President himself to determine for himself in dealing with his own subordinate in his own department. . . .

Reading 8

The Public Presidency

WOODROW WILSON

The makers of our federal Constitution followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm. The admirable expositions of the *Federalist* read like thoughtful applications of Montesquieu to the political needs and circumstances of America. They are full of the theory of checks and balances. The President is balanced off against Congress, Congress against the President, and each against the courts. . . .

. . . The presidency has been one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him. One account must be given of the office during the period 1789 to 1825, when the government was getting its footing both at home and abroad, struggling for its place among the nations and its full credit among its own people; when English precedents and traditions were strongest; and when the men chosen for the office were men bred to leadership in a way that attracted to

them the attention and confidence of the whole country. Another account must be given of it during Jackson's time, when an imperious man, bred not in deliberative assemblies or quiet councils, but in the field and upon a rough frontier, worked his own will upon affairs, with or without formal sanction of law, sustained by a clear undoubting conscience and the love of a people who had grown deeply impatient of the regime he had supplanted. Still another account must be given of it during the years 1836 to 1861, when domestic affairs of many debatable kinds absorbed the country, when Congress necessarily exercised the chief choices of policy, and when the Presidents who followed one another in office lacked the personal force and initiative to make for themselves a leading place in counsel. After that came the Civil War and Mr. Lincoln's unique task and achievement, when the executive seemed for a little while to become by sheer stress of circumstances the whole government, Congress merely voting supplies and assenting to necessary laws, as Parliament did in the time of the Tudors. From 1865 to 1898 domestic questions, legislative matters in respect of which Congress had naturally to make the initial choice, legislative leaders the chief decisions of policy, came once more to the front, and no President except Mr. Cleveland played a leading and decisive part in the quiet drama of our national life. Even Mr. Cleveland may be said to have owned his great role in affairs rather to his own native force and the confused politics of the time, than to any opportunity of leadership naturally afforded him by a system which had subordinated so many Presidents before him to Congress. The war with Spain again changed the balance of parts. Foreign questions became leading questions again, as they had been in the first days of the government, and in them the President was of necessity leader. Our new place in the affairs of the world has since that year of transformation kept him at the front of our government, where our own thoughts and the attention of men everywhere is centered upon him. . . .

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant rôles, but it has not prevented it. . . . Greatly as the practice and influence of Presidents has varied, there can be no mistaking the fact that we have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation.

As legal executive, his constitutional aspect, the President cannot be thought of alone. He cannot execute laws. Their actual daily execution must be taken care of by the several executive departments and by the now innumerable body of federal officials throughout the country. In respect of the strictly executive duties of his office the President may be said to administer

the presidency in conjunction with the members of his cabinet, like the chairman of a commission. He is even of necessity much less active in the actual carrying out of the law than are his colleagues and advisers. It is therefore becoming more and more true, as the business of the government becomes more complex and extended, that the President is becoming more and more a political and less and less an executive officer. His executive powers are in commission, while his political powers more and more center and accumulate upon him and are in their very nature personal and inalienable. . . .

He cannot escape being the leader of his party except by incapacity and lack of personal force, because he is at once the choice of the party and of the nation. He is the party nominee, and the only party nominee for whom the whole nation votes. Members of the House and Senate are representatives of localities, are voted for only by sections of voters, or by local bodies of electors like the members of the state legislatures. There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice; and inasmuch as his strictly executive duties are in fact subordinated, so far at any rate as all detail is concerned, the President represents not so much the party's governing efficiency as its controlling ideals and principles. He is not so much part of its organization as its vital link of connection with the thinking nation. He can dominate his party by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statement of policy which will enable it to form its judgments alike of parties and of men.

For he is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his own views.

. . . If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.

. . . [We] can safely predict that as the multitude of the President's duties increases, as it must with the growth and widening activities of the nation itself, the incumbents of the great office will more and more come to feel that they are administering it in its truest purpose and with greatest effect by regarding themselves as less and less executive officers and more and more directors of affairs and leaders of the nation,—men of counsel and of the sort of action that makes for enlightenment.

Reading 9

The Prerogative Presidency

ABRAHAM LINCOLN

Letter to A. G. Hodges (April 4, 1864)

My dear Sir: You ask me to put in writing the substance of what I verbally said the other day in your presence, to Governor Bramlette and Senator Dixon. It was about as follows:

"I am naturally antislavery. If slavery is not wrong, nothing is wrong. I cannot-remember when I did not so think and feel, and yet I have never understood that the presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. I understood, too, that in ordinary civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery. I had publicly declared this many times, and in many ways. And I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand, however, that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that government—that nation, of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assume this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to save slavery or any minor matter, I should permit the wreck of government, country, and Constitution all together. When, early in the war, General Frémont attempted military emancipation, I forbade it, because I did not then think it an indispensable necessity. When, a little later, General Cameron, then Secretary of War, suggested the arming of the blacks, I objected because I did not yet think it an indispensable necessity. When, still later, General Hunter attempted military emancipation, I again forbade it, because I did not yet think the indispensable necessity had come. When in March and May and July, 1862, I made earnest and successive appeals to the border States to favor compensated emancipation, I believed the indispensable necessity for military emancipation and arming the

Source: John Nicolay and John Hay, eds., *The Complete Works of Abraham Lincoln*, Vol. 10 (New York: Francis D. Tandy Co., 1984), 65–68. (Albert G. Hodges was editor of the Frankfort, KY, *Commonwealth*; this letter was used as a campaign document in the 1864 election.)

blacks would come unless averted by that measure. They declined the proposition, and I was, in my best judgment, driven to the alternative of either surrendering the Union, and with it the Constitution, or of laying strong hand upon the colored element. I chose the latter. In choosing it, I hoped for greater gain than loss; but of this, I was not entirely confident. More than a year of trial now shows no loss by it in our foreign relations, none in our home popular sentiment, none in our white military force—no loss by it anyhow or anywhere. On the contrary it shows a gain of quite a hundred and thirty thousand soldiers, seamen, and laborers. These are palpable facts, about which, as facts, there can be no caviling. We have the men; and we could not have had them without the measure.”

“And now let any Union man who complains of the measure test himself by writing down in one line that he is for subduing the rebellion by force of arms; and in the next, that he is for taking these hundred and thirty thousand men from the Union side, and placing them where they would be but for the measure he condemns. If he cannot face his case so stated, it is only because he cannot face the truth.”

I add a word which was not in the verbal conversation. In telling this tale I attempt no compliment to my own sagacity. I claim not to have controlled events, but confess plainly that events have controlled me. Now, at the end of three years’ struggle, the nation’s condition is not what either party, or any man, devised or expected. God alone can claim it. Whither it is tending seems plain. If God now wills the removal of a great wrong, and wills also that we of the North, as well as you of the South, shall pay fairly for our complicity in that wrong, impartial history will find therein new cause to attest and revere the justice and goodness of God.

Yours truly,
A. Lincoln

Reading 10

The Presidency in the Political Order

STEPHEN SKOWRONEK

Order and Time in Presidential Studies

The American presidency reflects nothing so clearly as the idiosyncrasies of personality and circumstance. The discrete dynamics of the men and their times are naturally pronounced; the general dynamics that define the institution in time, correspondingly obscured. This makes thematic analysis of the presidency peculiarly dependent on uncovering broad-ranging patterns in institutional history. By isolating different historical regularities we can locate different dimensions of the problem and significance of presidential action.

Source: Stephen Skowronek, “Notes on the Presidency in the Political Orders” in *Studies in American Political Development*, Vol. 1, ed Karen Orren and Stephen Skowronek (New Haven: Yale University, 1986), 286–302. © 1986 Yale University Press. Used by permission of Yale University Press.

Sorting out these various dimensions of order in presidential history is one of those basic conceptual exercises that tends to get lost in the divisions of contemporary scholarly discourse. . . . Still, it is possible to identify two broad-ranging historical constructs at work in the current literature, and by distinguishing the conceptions of institutional order and time that they bring to presidential studies, we can begin to think in terms of other possibilities for organizing research.

Without question, the key organizing concept in the current literature is the “modern presidency.” As an analytic tool, the modern presidency construct relates changes in international relationships, social relationships, and technological capacities to changes in the governing responsibilities, institutional resources, and political position of recent incumbents. The concept tracks the emergence of a new kind of presidential politics in recent years, and in so doing, it draws a fairly sharp distinction between what is past and what is still significant in presidential history. . . . The establishment of the Executive Office of the President in 1939 seems to have offered scholars the clearest benchmark of the modern order in presidential politics, for this event signaled a permanent alteration in the governmental purview and institutional operations of the office. As [Fred Greenstein] put it: “The transformation of the office has been so profound that the modern presidencies have more in common with one another in the opportunities they provide and the demands they place on their incumbents than they have with the entire sweep of traditional presidencies from Washington’s to Hoover’s.”

The significance of the changes illuminated by the modern presidency construct is clear enough. But the modern/traditional dichotomy that it brings to presidential research remains a matter of analytic perspective, and like any other perspectives, its basic assumptions and limitations need always to be kept in view. Most obviously, the modern presidency construct consigns almost three-quarters of an already small universe of incumbents to virtual irrelevance. Moreover, by detaching incumbents after FDR from their predecessors and treating them as a coherent group, the modern presidency construct naturally attends to what the members of the group share; their differences, on the other hand, tend to get relegated back to the impenetrable idiosyncrasies of personality and circumstance. Finally, as the modern presidency construct defines the significance of the institution in terms of relationships that are emergent in American politics, it naturally submerges the significance of those that have been constant or recurrent.

In this regard, the more traditional “constitutional presidency” construct takes on special significance. Instead of a great historical disjunction, this construct carries a strong ascription of continuity and integrity in the institution over the entire course of its operation. In the constitutional construction of order and time, the presidency is situated as one institution operating in a fixed and enduring structure of separated institutions that share powers. Presidents are engaged in a perpetual and unresolvable struggle over the scope of their institutional prerogatives. The constitutional balance has tilted this way and that, and the constitutional order as a whole has adapted to new governing demands, but in its most fundamental aspects, the American Constitution has not “developed.” The basic constitutional dynamics are timeless. . . . This approach takes the imperial implications out of the emergence of the modern

presidency and identifies in their place important linkages among institutional origins, institutional capacities, and contemporary institutional crises.

... When considered side by side the “modern presidency” and the “constitutional presidency” appear as two heuristic devices delineating distinct analytic positions and offering complementary insights into the subject at hand. Furthermore, by bringing two dimensions of presidential history to the center of attention, this juxtaposition immediately prompts consideration of others and, thus, opens the door to a range of complementary historical/structural investigations.

POLITICAL ORDER AND POLITICAL TIME

From this vantage point, we can begin to distinguish a specifically political dimension in presidential history. The president stands at the critical intersection between order and change in American politics. His office is vital to the security of interests in power, his action always a potential threat to previously established power arrangements. This perspective brings into view a somewhat different presidency, an “order-shattering,” “order-affirming,” “order-creating” institution that holds a pivotal place in the dynamics of systemic political change.¹

A study of the presidency in these terms requires careful consideration at the outset of the analytic construction of order and time most appropriate to the task at hand. When we think thematically about the politics of presidential leadership, we are likely to think in terms of the demands and resources of the modern presidency and their relationship to the basic constitutional structure. But neither the modern nor the constitutional construction of presidential history directly addresses the presidency as an institution operating in a political order or the president as an actor in political time. . . .

I will begin with a conventional, albeit not uncontroversial, construction of political history. This scheme, often grounded in the dynamics of electoral alignments and party systems, divides American history into a succession of distinctive political regimes—the Jeffersonian (1800–28), the Jacksonian (1828–60), the Republican (1860–1932), and the New Deal (1932–80). In elaborating upon the ideas, interests, and institutions that have distinguished each of these regimes in the organization of our political life, scholars have pointed to the significance of the presidency in the ongoing process of regime construction and disintegration. In taking up this cue, we naturally focus on political relationships that have periodically recurred in American presidential history. There are, after all, several beginnings and several endings in this construction of order and time. . . .

What I am suggesting, then, is that . . . we approach the presidency as an institution that is mediated by the generation and degeneration of political orders, and that we approach presidents as leaders who actively intervene at various stages in this process. In this way, the modern period can be dissected as a sequence of political change, and the various political problems of presidential action presented in the modern period can be understood with reference to past sequences. Unlike the “constitutional presidency” construction of order and time, this perspective does not address presidential history as a piece;

rather, it divides presidential history into distinct periods and distinguishes the different political opportunity structures for presidential action within each. Unlike the “modern presidency” construction of order and time, this perspective does not detach the modern incumbents from the rest and approach them as a coherent group; rather, it brings to the fore problems of political action that distinguish the modern presidents from one another and link them individually across historical periods to their counterparts in political time. When presidential history is broken into regime segments, and presidents are grouped together for an analysis informed by the similar positions they hold in political time, the past becomes something more than an extended prelude to the present and the modern presidents something more than a group apart.

THE DYNAMICS OF POLITICAL DEVELOPMENT AND THE STRUCTURES OF PRESIDENTIAL LEADERSHIP

Each regime begins with the rise to power of a new political coalition that is able to construct and legitimize a particular set of governing arrangements and, in so doing, to define relations between state and society in ways advantageous to its members. The dominant coalition then attempts to perpetuate its position by responding to changes in the nation at large through modifications and elaborations of its basic agenda. Once established, however, coalition interests can have an enervating effect on the governing capacities of these regimes. An immediate and constant problem is posed by conflicts of interest within the dominant coalition. The danger here, of course, is that attempts to elaborate the coalition’s political agenda will focus a sectarian struggle, weaken regime support through factional disaffection, and open new avenues to power for the political opposition. A longer-range and ultimately more devastating problem is posed to changes in the nation at large that throw into question the dominant coalition’s most basic commitments of ideology and interest. The danger here, of course, is that the entire political regime will be called into question as an inadequate governing instrument and then repudiated wholesale in a nationwide crisis of political legitimacy.

Considering the history of the presidency in this light, two relationships stand out as especially significant for an analysis of the politics of leadership. First is the president’s affiliation with the political complex of interests, institutions, and ideas that dominated state/society relations prior to his coming to office. Second is the current standing of these governmental arrangements in the nation at large. These relationships are, of course, always highly nuanced, but certain basic variations can be discerned. To get at them we might conceptualize the leadership problem with reference to those institutions with which political regimes are invariably identified in America, namely, the political parties. Using this shorthand, we can approach presidential history with two questions in mind: Is the president affiliated with the previously dominant political party, and how vulnerable are the governmental commitments of that party to direct repudiation as failed and irrelevant responses to the problems of the day?

From the answers to these questions, it is possible to specify four typical opportunity structures for the exercise of political leadership by a president. In the first, the basic governmental commitments of the previously dominant political party are vulnerable to direct repudiation, and the president is associated with the opposition to them. In the second, basic governmental commitments of the previously dominant political party are again on the line, but this time the president is politically affiliated with them. In the third, the governmental commitments of the previously dominant political party still appear timely and politically resilient, but the president is linked with the political opposition to them. In the fourth, the governmental commitments of the previously dominant political party again appear timely and politically resilient, and the president is affiliated with them. These four opportunity structures are represented in Table 10.1, with the “previously dominant political party” designated as the “regime party” for easy reference.

Each of these structured situations defines a different institutional relationship between the presidency and the political order, each engages the president in a different type of politics, and each defines a different kind of leadership challenge. In the discussion that follows, the presidents that best fit each type are grouped together. The object is to highlight the distinctive problems and dynamics of political action that seem to adhere to the institution in these situations, and not, of course, to deny differences in the ways incumbents actually approached these problems or grappled with these dynamics. Cross currents among the types will also be noted. The second point is that this typology does not offer an independent explanation of the historical patterns on which it draws. There is no accounting here for whether a regime affiliate or a regime opponent will actually be elected (or otherwise come into office), nor for when in the course of the nation’s development a regime’s basic governmental commitments will be called into question. . . . My purpose is to suggest the ways in which political structure has delimited the political capacities of the presidency and informed the significance of presidential action.

The *politics of reconstruction* has been most closely approximated in the administrations of Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt. . . . They shared the most promising of all situations for the exercise of creative political leadership. Each came to power on the heels of an upheaval in electoral politics. More specifically, their victories were driven by widespread discontent with the established order of things and were potent

TABLE 10.1**The Political Structure of Presidential Leadership**

Standing of the Regime Party’s Commitments in the Nation at Large		President’s Relationship to the affiliated
	Regime Party opposed	
vulnerable	politics of reconstruction	politics of disjunction
resilient	politics of preemption	politics of articulation

enough to displace a long-established majority party from its dominant position in both Congress and the presidency. With political obligations to the past thus severed, these presidents were thrust beyond the old regime into a political interregnum where they were directly engaged in a system recasting of the government's basic commitments of ideology and interest. (It might be noted in passing that other elections that have also been classified as "critical" in terms of their effects on old political alignments were quite different in their political impact on the presidency. The election of 1896, reaffirming and extending as it did the Republican party's hold over the national government, is perhaps the most obvious case in point. William McKinley was not engaged in a political reconstruction but in the consolidation of the Republican regime.)

The political preeminence of the presidency appears to be most naturally pronounced, then, when the old regime has been discredited, when old alliances have been thrown into disarray, and when new interests have been thrust afresh upon governmental institutions. More important, however, is what the performance of leaders in this situation can tell us about the structured capacities of the presidency as a political institution. Order-shattering elections do not themselves shape the future, but they vastly expand the president's capacities to break the governmental commitments of the immediate past and to orchestrate a political reordering of the rules and conditions of state/society relations. It is significant in this regard that none of the presidents who have been engaged in this politics of reconstruction had much success in actually resolving the tangible problems that gave rise to the nationwide crisis of political legitimacy in the first place. Jefferson's attempt to deal with the problems at issue in the international crisis of 1798 proved a total failure; Jackson's attempt to deal with the long-festered problem of national banking precipitated an economic panic and ultimately exacerbated a devastating depression; Lincoln's proposed solution to the sectional conflict of the 1850s plunged the nation into a civil war; and Roosevelt's New Deal failed to pull the nation out of the Depression. But what these presidents could do that their predecessors could not was to redefine thoroughly the significance of the events they oversaw and the solutions they proposed. Released from the burden of upholding the integrity of the old regime, these presidents were not restricted in their leadership to mere problem solving. Situated just beyond the old regime, they reformulated the nation's political agenda as a direct response to the manifest failures of the immediate past and galvanized political support for the release of governmental power on entirely new terms.

The leadership opportunities afforded by this kind of political breakthrough are duly matched by certain characteristic political challenges. In penetrating to the core of the political system and orchestrating a political reordering of state/society relations, these presidents ultimately found it imperative to try to secure a governmental infrastructure capable of perpetuating the new order. The shape of the new regime will hinge on the way party lines are recast and on how institutional relationships within the government are reorganized, and it may be observed that the natural dovetailing of party-building efforts with efforts at institutional reconstruction is a distinctive mark of this leadership situation. The assertion of presidential control over these fundamentals of political reordering

is problematic, of course, because the distillation of new power arrangements inherent in a "Court Battle," a "Bank War," or a military occupation crystallizes opposition as well as support. The point, however, is that in examining the politics of reconstruction we can look beyond the great deeds of great men. We can examine the expansive capacities of the presidency in a political interregnum where prior governmental commitments are most vulnerable.

The *politics of disjunction* has been most closely approximated in the administrations of John Quincy Adams, Franklin Pierce, James Buchanan, Herbert Hoover, and Jimmy Carter. . . . They share what might well be taken as the very definition of the impossible leadership situation. Rather than orchestrating a political breakthrough in state/society relations, these presidents were compelled to cope with the breakdown of those relations. Their affiliation with the old regime at a time when its basic commitments of ideology and interest were being called into question turned their office into the focal point of a nationwide crisis of political legitimacy. This situation imparted to them a consuming preoccupation with a political challenge that is really a prerequisite of leadership, that of simply establishing their own political credibility.

Each of the major historical episodes in the politics of disjunction has been foreshadowed by a long-festering identity crisis within the old majority parties themselves. The candidacies of Adams, Pierce, Hoover, and Carter were propelled to success more by default than by the enthusiasm of the traditional centers of party power. The exhaustion of the political orthodoxy of each regime is strongly suggested by the failure of stalwart party leaders to command authority and control the nominating process. Also clearly in evidence is the cumulative toll that sectarian controversies within the dominant coalition can take on the credibility of the candidate in just assuming the role of party leader. But the distinctiveness of this juncture in political time . . . lies in changes within the nation that obscure the regime's relevance as an instrument of governance and cloud its legitimacy as caretaker of the national interest. Adams, Hoover, and Carter are, after all, presidents as notable for their personal determination to pull their respective regimes into a new era as they are for the weakness of their political connections to the party establishment. The fact that they each came to epitomize the bankruptcy of the old regime brings us face to face with the most perplexing and paralyzing of all leadership dilemmas.

In this situation, a Hobson's choice is presented between upholding the integrity of the old order and repudiating its basic commitments. On the one side, the president is all too easily stigmatized as a symptom of the nation's problems and a symbol of the failure of the entire regime; on the other, he is all too easily isolated from his most natural allies and rendered politically impotent. The stakes of innovation thus pit regime integrity directly against regime effectiveness, and the president shatters both by trying to respond to radically new governmental conditions within the received terms and conditions of political discourse. Herein lies an explanation for the striking propensity of presidents in this situation to grapple with great national issues as technical, nonpolitical problems, even when the political implications of the innovations they propose necessarily involve significant departures from the governmental commitments of the past. Unable

to address directly the most basic political question he faces—the regime’s legitimacy—the president finds his capacity to penetrate national politics and mobilize support severely attenuated, and leadership is reduced to mere problem solving. In examining the politics of disjunction, then, we can look beyond the failures of individuals. We can come to terms with the constricted capacities of the presidency during the collapse of old political definitions and with the particular challenges faced by the president as leader of an enervated regime.

The *politics of preemption* has engaged a large number of presidents, some of the more aggressive leaders among them being John Tyler, Andrew Johnson, Woodrow Wilson, and Richard Nixon. The men in this grouping stand out as wild cards in American political history. As their experiences indicate, the politics of leadership in this situation are especially volatile, and perhaps least susceptible to generalization. Tyler was purged from the ranks of the party that elected him; Wilson took a disastrous plunge from the commanding heights of world leadership into the political abyss; Johnson and Nixon were crippled by impeachment proceedings. Of all the presidents that might be grouped in this situation, only Dwight Eisenhower finished a second term without suffering a precipitous reversal of political fortune, but this exception is itself suggestive, for Eisenhower alone kept whatever intentions he might have had for altering the shape of national politics well hidden.

As the leader of the opposition to a previously dominant party that can still muster formidable political, ideological, and institutional support, the president interrupts the working agenda of national politics and intrudes into the establishment as an alien power. The exercise of creative political leadership hinges on expanding and altering the base of opposition support, and here the leader is naturally drawn toward latent interest cleavages and factional discontent within the ranks of the regime’s traditional supporters. These leadership opportunities are not hard to find, but the political terrain to be negotiated in exploiting them is treacherous. To preempt the political discourse of an established regime, the president will simultaneously have to maintain the support of the stalwart opposition, avoid a direct attack on regime orthodoxy, and offer disaffected interests normally affiliated with the dominant coalition a modification of the regime’s agenda that they will find more attractive. Testing both the tolerance of the opposition and the resilience of the establishment, the leader openly tempts a massive political repudiation from both.

Compared to a president engaged in a politics of disjunction, the leader here has a much greater opportunity to establish and exploit a posture of political independence. Compared to a president engaged in a politics of reconstruction, however, he faces a much greater risk of political isolation. Probing alternative lines of political cleavage, the president may well anticipate new party building possibilities, but, short of a systemic electoral break with the immediate past, opposition leadership mainly has the effect of wreaking havoc on the established political regime. The example of Woodrow Wilson stands out for special attention in this regard, for the fortuitous rupture within the Republican party that brought him to power carried the strongest overtones of a reconstructive breakthrough. Wilson ably exploited the opportunities opened by Republican divisions and discontent among progressives to realize a monumental legislative program,

but this achievement, worked as it was through the regular Democratic party, only held the Republican resurgence at bay. Even before the end of Wilson's first term, it was apparent that a reconstruction of the Democratic party along progressive lines was not in the cards and that his innovations would not have any transformative effect on the shape of national politics. Wilson explored new lines of independent political action with the public, and his program broached the possibility of recasting the political identity of the Democratic party; but the resilience of the old political divisions, and Wilson's own appreciation of their primacy, delimited and personalized both his political achievements and his ultimate collapse. . . .

The *politics of articulation* has engaged the largest number of presidents. . . . Here the presidency is the font of political orthodoxy and the president, the minister to the faithful. The opportunity for the exercise of political leadership lies in moving forward on the outstanding political commitments on the regime's agenda and in prodding the establishment to adjust to changing times. The corresponding challenge is to mitigate and manage the factional ruptures within the ranks of the regime's traditional supporters that inevitably accompany any new specification of regime purposes.

In each of America's major political regimes, there has been one particular episode of the politics of articulation that stands out, not only as typical of the problems and prospects this situation holds for presidential leadership but also as pivotal in the course of each regime's development. In the Jeffersonian era, it came in the first term of James Monroe; in the Jacksonian era, in the administration of James Polk; in the Republican era, in the administration of Theodore Roosevelt; in the New Deal era, in the administration of Lyndon Johnson. These men exercised power in especially propitious circumstances. At the outset of each of these administrations we find a long-established majority party reaffirmed in its control of the entire national government, and a national posture so strong at home and abroad that it left no excuses for not finally delivering on long-heralded regime promises. Each president thus set full sail at a time when it was possible to think about completing the unfinished business of national politics and realizing the regime's highest moral vision for the nation. But if a leadership project of culmination and completion suggests a great leap forward, it also implies the maintenance of certain fundamental political commitments. In these presidencies, a regime at the apex of its projection of national power and purpose became mired in the dilemmas of reconciling commitments with the expansive political possibilities at hand, and assiduous efforts by the president to serve all interests in the pursuit of new initiatives set off an explosion of conflicting expectations. Paradoxically, then, as these leaders pushed ahead with the received business of national politics, they fomented deep schisms within the ranks and instigated real political changes that they could not openly address without aggravating the situation. On the verge of its fullest political articulation as a governing instrument, each regime was pulled into an accelerated sectarian struggle over the true meaning of orthodoxy.

... Whereas in the politics of reconstruction, the president stands opposed to the old regime and orchestrates the breakthrough to a new one, here the leader is pulled by the competing impulses to maintain the political regime and to fulfill its potential through innovation and change. Finally, just as every episode in the politics of preemption entices the leader to probe for reconstructive possibilities, every episode in the politics of articulation challenges the leader to hold at bay the specter of a political disjunction.

In this context, one cannot help but observe that James Polk, Theodore Roosevelt, and Lyndon Johnson each prematurely disavowed the further pursuit of political power. The balance between the creative and destructive capacities of leadership is so precariously poised in the politics of articulation that those most thoroughly possessed by the impulses to lead seem compelled to try to escape the consequences of their own actions. Political self-sacrifice appears in this light as a kind of personal absolution for the real political changes instigated by executive innovation. By voluntarily stepping out of political contention the president can assert the integrity of his faith in the pursuit of policies that will lead his natural allies to question it. The example of Theodore Roosevelt as he wrestled with the relationship between executive innovation and regime maintenance is perhaps most suggestive here. As president, Roosevelt launched his most vigorous reform efforts on the heels of an announcement that he would not run for reelection. He sought to secure his effort to turn the Republican party toward reform by handpicking his own successor, but this only passed to Taft Roosevelt's own political problems with reconciling orthodoxy and innovation in the Republican regime. When Taft faltered, Roosevelt reentered national politics in the incongruous guise of an insurgent party-builder bent on displacing the old regime altogether. But despite his enormous popularity, he had even less success attacking established power broadside than he did trying to recast it from within. Roosevelt's insurgency proved both self-defeating and politically disastrous. . . .

PRESIDENTIAL LEADERSHIP AS CREATIVE REPUDIATION

A typology of the political structures of presidential leadership is useful to the extent that it illuminates a significant and relatively unattended historical dimension in which this most idiosyncratic of institutions has operated. Complementing our conceptions of the presidency as an institution operating in a constitutional order of separated institutions sharing powers, and an institution operating in a modern order of world power, expanded administrative capacities, and high technology, there is here at least a working conception of the presidency as an institution operating in a political order of changing party alignments, coalition agendas, and public discourse. Presidents, by their very nature as historical actors, seek to articulate and effect timely alterations in the previously established political order; but the politics of leadership emerges here as a contingency that hinges in large measure on the structure of relations among the incumbent, the old regime, and the nation at large.

If there is one overarching theme running through this framework, it is that the creative political capacities of the presidency are inextricably linked to the contingent political authority of the incumbent to challenge the governmental commitments of the immediate past. The underlying question in all presidential efforts to respond to the present and shape the future is always how much of the past (ideas, institutions, interests, and precedents) can be and must be called into question. Consider again in this light the extremes of failure and success in creative political leadership that get juxtaposed periodically in presidential history. John Quincy Adams and Andrew Jackson, James Buchanan and Abraham Lincoln, Herbert Hoover and Franklin Roosevelt, Jimmy Carter and Ronald Reagan—each of these pairs had to grapple with an especially stark confrontation between past and present in American national development, and each pair divides on the structured political authority of the president to repudiate the past.

The creative and destructive sides of presidential leadership seem to be most-effectively and openly joined in a politics of reconstruction. But they are by no means absent in the other situations. By more closely attending to the double-edged character of executive innovation and the political determinants of executive-authority, we may begin to formulate a clearer view of the presidency as a driving force of political change in its own right. The themes of the typology might ultimately be turned around to address directly the question of how the political-dynamics of presidential leadership reflect back upon the broader political system. Here the various dispositions of the presidency in the political order would be marked as an essential counterpoint to the changing shape of electoral politics and party systems.

ENDNOTE

1. I have drawn these terms from Edward Shils's discussion of the "charisma of office" in traditional and legal rational societies. See Edward Shils, *The Constitution of Society* (Chicago, IL: University of Chicago Press, 1982), 119–42. My usage of "political order" deserves some clarification at this point for there are two closely related ideas implied by the term that need to be distinguished. First, we may speak of the historical political orders or political regimes that have dominated state/society relations in America for relatively long periods of time as durable arrangements of political interests, ideas, and institutions. In this way, scholars have traditionally spoken of the Jeffersonian era and the Jacksonian era as coherent and distinctive orders, and contemporary scholars have spoken of the New Deal political order extending over the modern period. I will so far as practical use the term *regime* to refer to these historical orders. At a more abstract level, it is possible to speak of the political order in terms of the regularities that have underscored the sequential generation and degeneration of these historical regimes. In this sense, the historical regimes are the materials out of which an overarching conception of political order as an analytic construct can be derived. Thus, to modify Shils's terms a bit, it might be more accurate to speak of the presidency in the political order as a "regime"-shattering, "regime"-affirming, "regime"-creating institution. The order is found in the recurrent patterns of regime change. It is this historically abstracted and analytic usage of the term *political order* that parallels the "modern" order and "constitutional order" as heuristic constructs drawn from presidential history.

Selecting Presidents: Campaigns, Elections, and Mandates

Presidents are not born, they are made. They are survivors of a long, drawn-out, exhausting, and often humiliating process of presidential selection. With but one exception, all of the occupants of the Oval Office have been elected in their own right, either as president or as vice president. (The exception was Gerald R. Ford, who in 1973 was nominated by an embattled President Richard Nixon to replace Vice President Spiro Agnew, who had resigned; he was confirmed by Congress and became president the following year when Nixon himself resigned.)

The tortuous nomination and election process demands individuals of stamina, resilience, and an infinite capacity for constant exposure and even public embarrassment. Only the most driven and thick-skinned individuals will survive.

Such hurdles overwhelm many potential candidates. Indeed, most of the nation's most talented figures, even those already holding public office, decline to try for the presidency. Some decline to run for tactical reasons. In some recent selection cycles, very few of the individuals who would have been on an impartial handicapper's short list of qualified presidential aspirants actually made the race.

Other potential candidates may falter because they carry personal baggage of a controversial nature. In the 1960s New York Governor Nelson Rockefeller was shunned by Republican kingmakers and primary voters in part because he had divorced his wife in favor of a younger woman. Divorce apparently no longer disqualifies a candidate (Ronald Reagan and John Kerry, among other contenders, were divorced). Nor do "youthful indiscretions" bar a candidacy; voters tended to overlook such matters concerning Presidents Bill Clinton and George W. Bush (though Clinton's were hardly "youthful"). Former House speaker Newt Gingrich in 2012 had among his excess baggage no less than three marriages and at least one extra-marital affair. Although he confessed his sins, it is likely that at least some of the GOP's social conservatives found it hard to forgive him.

Still other potential candidates are disqualified because, despite their talents, they are simply unelectable. When in 1888 the British scholar and diplomat James Bryce wrote his famous work, *The American Commonwealth*, he entitled his third chapter, “Why Great Men Are Not Chosen Presidents.” His proposition is at least as true today, more than a century later. In every generation there are men and women of singular talent, skill, or vision who are simply unsuited to the rigors of electoral campaigns, or who disdain the indignities of modern presidential contests, or who for one reason or another prove unattractive to a large segment of voters.

The selection process has two distinct though closely related phases: *nomination* and *election*. The Constitution embraces a convoluted scheme—much modified by historical practice—for electing presidents; but no mechanism was contemplated for choosing candidates for the office.

Almost from the beginning, presidential candidates have been nominated by political groups: congressional factions at first, and then modern mass political parties through national conventions—whose delegates are chosen in various ways, but now mainly by statewide primary elections. It is fair to say that nominees are chosen by an interplay of forces: Preferences of party leaders and core constituents that are mitigated by evidence of an individual’s electability—as determined by opinion surveys, organizational and fund-raising success, and primary election outcomes—all aimed at winning delegates to the parties’ quadrennial conventions. Insofar as parties tend to be dominated by hard-core leaders or loyal groups, their candidate choices may not always square with what the general public might prefer. This is true even when candidates (or rather, delegates pledged to support them) are chosen by open primary elections, because participation levels at the nominating stage are often quite low.

The complicated rules of the nominating game are the product of several forces. Federal laws govern certain aspects of the process, especially with regard to nondiscrimination and campaign finance. By enacting rules, the parties themselves set standards for the selection process—for example, acceptable methods of selecting delegates, their fairness and representativeness, and so forth. But it is the states—following the lead of their state party organizations—that enact the laws specifying the details for selecting delegates. The states also control the timetable for selection—by primaries, conventions, or caucuses—during the presidential election year. Although the national parties have specified windows during which delegates are supposed to be selected, many states have been reluctant to comply.

These contests stretch over nearly six months, from January through June. The few early contests—most notably, the Iowa caucuses and the New Hampshire primary—command media attention because they are first real tests of candidate strength. Formerly, the state contests were scattered throughout the six-month period. Now, however, they tend to be bunched toward the beginning of the season, as politicians in the various states strive to maximize their influence over the selection. Students describe the process as “front-loaded”: that is, winners are expected to emerge quickly. The 2008 nominating season

was supposed to be dominated by “super Tuesday” (February 5), when contests occurred in 22 states (including California, Georgia, Illinois, and New York). Only 11 states scheduled contests after the end of March.¹ Four years later, “Super Tuesday” was scheduled for March 6—when 22 states and their 783 delegates would be chosen.

The quick-result scenario worked in 2008 for the Republicans, whose delegates tend to be awarded in a winner-take-all fashion—that is, candidates who win majorities or even pluralities of popular votes tend to win all the state’s delegates. The Democrats, however, labor under a proportional-representation system, in which candidates with at least 15 percent of the popular vote are entitled to their share of the state’s delegates. In 2008, the leading candidates—Hillary Clinton and Barack Obama—rivalled in popular victories and delegate counts, so that the contest remained close to the end.

Candidates vie not only to win in these critical states but also to solidify their support among their party’s most loyal supporters—for example, feminists, Blacks, and Latinos for the Democrats, small businesspeople and religious conservatives for the Republicans (to name just a few such groups). Endorsements from well-known party or interest group leaders are one way of demonstrating such support. Finally, candidates strive to establish and maintain credibility through favorable poll results and successful fund-raising. Each aspect of nominating politics is monitored, publicized, and interpreted by the media, which seem to have usurped the party leaders’ traditional role in winnowing out candidates.

The nominating process is deeply flawed. It is long, chaotic, costly, and demeaning. It is influenced too much by early contests that occur in unrepresentative states like Iowa and New Hampshire. Participation, even in primary elections, is unimpressive; the most likely participants tend to be those who are the most militant partisans or who are followers of organized interest groups. Many, perhaps most, of the nation’s ablest leaders are simply unwilling to make the personal and financial sacrifices required to run the race.

In laying out the politics of nominations, James E. Campbell explains how they influence the conduct and outcomes of the general election contests. Historically, the easier the candidates’ paths to party nomination, the more likely they are to prevail in the election that follows. Divisive nomination battles complicate the eventual winner’s campaign strategy and financing. A unified party, on the other hand, bestows many blessings: enthusiastic party loyalists who decide early to support the nominee, an ability to direct funds toward the inter-party contest, and an absence of lingering criticisms supplied by former intra-party rivals.

In her essay, Lara M. Brown recounts the history of presidential nominations and how they developed. The Constitution made no explicit provision for how parties should determine their nominees for the presidency, so the process has changed over the decades depending on the political development of political parties. Primary elections were introduced in the early 20th century, but they did not come to dominate the process until the 1970s when reforms made them the main path for aspirants to win

delegates to national party conventions and thus their party's nomination. Brown analyzes the many advantages enjoyed by front-runners, especially in today's front-loaded nomination schedule, and argues that front-runners tend to win nomination.

The general election—pitting the parties' chosen candidates against one another—is a period of intense press scrutiny and frantic fund-raising. Coverage of the game (or “horse race”), although especially prevalent at the nomination stage, outpaces substantive coverage throughout the campaign. Another problem is that press reports are increasingly dominated by reporters themselves, who allow the candidates less and less time to speak for themselves. In 1968, the average sound bite—a block of uninterrupted speech by a candidate—was all of 42 seconds. By 1992, according to one study, candidates were given only 7.3 seconds of uninterrupted time to speak.² Candidates and their handlers are not blameless: They strive for brief attention-getting phrases that have little relevance to real issues or achievable policies. Politics is a great game, to be sure, but to treat it or report it as only a game has the inevitable effect of reducing voters to mere spectators and heightening their sense of alienation from the campaign and election.

National campaigns require huge amounts of money to finance all aspects of the candidates' and the parties' endeavors. The flow of money has not been stemmed by federal campaign finance rules. Spurred by scandals involving campaign money, Congress enacted the Federal Election Campaign Act (FECA) of 1974 (revised in 1976). The Act provided for public funding (financed through taxpayers' check-off on their annual tax returns) and limited the spending of presidential candidates. In presidential primaries, matching public funds are available to each candidate who meets the eligibility requirement and agrees to overall spending limits. In the general election, candidates may opt for full campaign funding through the fund. Minor-party or independent candidates may receive a portion of full funding. The formula for them is based on past or current votes received. The law also provides funds for pre-convention campaigning and for national party conventions.

FECA's intent was thwarted by the Supreme Court (Buckley v. Valeo, 1976), which upheld the Act's spending limits but struck down contribution limits as an abridgement of the First Amendment's guarantee of free speech. These rules were frequently violated by candidates of both parties. And unlimited giving to party committees for “party-building” purposes—“soft money”—was easily rechanneled into candidates' campaigns.

Further campaign funding scandals led in 2002 to the Bipartisan Campaign Reform Act (BCRA). The law—essentially ratified by a closely divided Supreme Court (McConnell v. Federal Election Commission, 2003)—banned soft money contributions but raised contribution limits and also encouraged independent groups' participation in campaigns. Until 2010, corporations, labor unions, and nonprofits were banned from drawing upon their own funds to pay for procandidate ads. In another 5-to-4 Supreme Court decision, Citizens United v. FEC (2010), this provision was invalidated as a limitation upon protected free speech. The Court's decision has been hotly debated—its

opponents scoffing at the idea that giving money is equivalent to free speech. Nonetheless, non-party groups are pouring money into political campaigns, often without revealing their contributors—in gross violation of the spirit of transparency that is essential for campaign finance reform.

Most of the major candidates—including those in 2008 and 2012—shunned public general election campaign funds in favor of exploiting huge networks of private contributors. Separate but parallel campaigns staged by independent groups supplied added funds, media appeals, and even personnel for get-out-the-vote (GOTV) drives. The essay by Gregory Fortelny, Peter Francia, and Clyde Wilcox explains the rules and analyzes why the rules have increasingly been trashed by candidates, parties, and other interested groups.

James Ceaser and Daniel DiSalvo analyze the victory of the Democratic Party in the 2008 elections and put the presidential election into historical perspective. They maintain that Obama's personal electoral victory was significant but that it was not massive or unusual by historical standards. The congressional elections, coming after the Democratic congressional gains in the 2006 elections, reinforced a trend toward the Democrats. Nevertheless, 2008 was by no means a "realigning" election, and the durability of the Democratic advantage would depend on the outcomes of the 2010 congressional elections and the 2012 presidential contest.

Given the prevailing image—that campaigns are run by opportunists and reported by cynics—it might be hard to determine what meaning to attach to a candidate's victory or defeat. Yet candidates do attempt to interpret the results, giving them the most favorable spin. Winning candidates, and especially those who win big, claim their victory as a public mandate endorsing certain policies and rejecting others. "The Myth of Presidential Mandate" is exploded by the distinguished Yale political scientist Robert A. Dahl. After recounting the history of presidents' claimed mandates, Dahl asks whether electoral results can accurately be construed as a reflection of the voters' policy views. The question is especially hard to answer for presidencies before about 1940, when public opinion surveys became common. Since 1940, however, Dahl finds little support for the existence of presidential mandates regarding specific issues. More modestly, elections confer on presidents the right to establish their agendas and try to gain their adoption.

The linkage between campaigns and governing is further explored in Roger H. Davidson's essay, which relates the Democrats' surge and decline in presidential and congressional contests between 2000 and 2010. The strategic dilemma for campaigning—and governing—is whether to focus upon your core supporters (typically, ideologues of the left or the right) or appeal to the moderate center of the populace, the swing voters. Core supporters are active and loyal, whereas centrists tend to be fickle and unreliable at the polls. Most recent candidates—especially George W. Bush in 2004—have therefore chosen to appeal to their core voters, in order to raise their enthusiasm and ensure their turnout. Centrist voters were attracted to Bush's perceived leadership qualities and his vows to protect the United States from terrorist attacks—even though many of these same people opposed his policies.

Within a year of the 2004 balloting, Bush's strategy of catering to his core supporters—so successful over the first five years of his presidency—turned against him. Although he had initially promised to be a “uniter” of the people, he became a “divider.”³ The Iraq War—originally portrayed as an extension of the war on terror—dragged on and gradually lost public support. Other shadows were cast over the Bush administration—especially by the government's lagging response to the devastating Hurricane Katrina.

President Barack Obama faces a markedly different problem in relating to his electorate. His voter base was assured in 2008: the Democrats' progressive loyalists, as well as Blacks and Hispanics, who voted for him in unprecedented numbers. His themes of “hope” and “change,” however vague, signified a departure from the policies of George W. Bush; and his ethnic background seemed to guarantee his image as a progressive. But his constituency was broadened with the addition of Independents, including young people and others who were less than predictable voters. His middle-of-the-road policies were mostly aimed at this centrist core. Two years later, the centrists melted away, as they tend to do in midterm elections. Meanwhile, the GOP core—including the right-wing Tea Party adherents—were energized to oppose what they saw as a socialist, costly, big-government agenda. His challenge for 2012 is to bring these centrists back into the ballgame while energizing his Democratic core voters—many of whom have expressed disillusionment because he failed to hoist the left-wing banner.

SELECTED BIBLIOGRAPHY

- Abramson, Paul R., John H. Aldrich, and David W. Rohde, *Change and Continuity in the 2004 Elections* (Washington, DC: CQ Press, 2006).
- Ceaser, James W., *Red over Blue: The 2005 Elections and American Politics* (Lanham, MD: Rowman & Littlefield, 2005).
- Fiorina, Morris P., with Samuel J. Abrams and Jeremy C. Pope, *Culture War? The Myth of a Polarized America* (New York: Longman, 2005).
- Mayer, William G., ed., *The Making of the Presidential Candidates 2004* (Lanham, MD: Rowman & Littlefield, 2003).
- Mayer, William G. and Andrew E. Busch, *The Front-Loading Problem in Presidential Nominations* (Washington, DC: Brookings Institution Press, 2003).
- Patterson, Thomas E., *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Vintage Books, 2003).
- Sabato, Larry J., ed., *The Year of Obama: How Barack Obama Won the White House* (New York: Longman, 2010).
- Wayne, Stephen J., *Personality and Politics: Obama for and Against Himself* (Washington, DC: CQ Press, 2011).

ENDNOTES

1. Democrats and Republicans vote on separate dates in some states.
2. Robert Lichter and Richard Noyes, *Good Intentions Make Bad News* (Lanham, MD: Rowman & Littlefield, 1996).
3. See Gary C. Jacobson, *A Divider, Not a Uniter* (New York: Pearson Longman, 2007).

Reading 11

Nomination Politics, Party Unity, and Presidential Elections

JAMES E. CAMPBELL

"In every American election there are two acts of choice, two periods of contest. The first is the selection of the candidate from within the party by the party; the other is the struggle between the parties for the place."

—James Bryce, from *The American Commonwealth*, 1891¹

Many changes occurred in the nomination process and campaigning in the century before Lord Bryce made this observation and certainly many more in the century since. The presidential nomination process, first controlled by a caucus of the parties in Congress, later evolved into a system in which delegates chosen by the state parties effectively decided the nomination in national nominating conventions. Efforts in the late 1960s to reform the nominating process into a more open and democratic system led to a proliferation of primaries, and decentralized caucuses spread out over several months. In the 1980s, states moved their primaries and caucuses to earlier in the year, creating the compressed or front-loaded primary-dominated, post-reform system that exists today. The basic sequence—a party nomination process followed by the general election—remained through all of these changes.

It also remained the case that the political parties' presidential nomination process is important in two respects. First, in our two-party system, among the many who might serve as president, the choice of who will serve is narrowed to the two candidates nominated by the major parties. Whoever is elected president will be either a Democrat or a Republican, as it has been in every election since 1852.

Second, the nomination process is important because the way candidates are nominated affects their prospects of victory in the general election campaign that follows. This consequence of nominations is less fully appreciated. Whether a party quickly and enthusiastically unites behind its nominee or engages in a rancorous internal struggle over who should be the party's standard-bearer substantially affects the nominee's chances in the general election campaign. The presidential nomination process is important in its own right for what it says about the political party, who controls the party, and what the party stands for. But it is also important as part of the larger

electoral process, as the prelude to the general election campaign. Whether a candidate gets a head start or starts from behind makes a big difference to who wins the race.

THE POST-REFORM NOMINATION PROCESS

There is no definite starting date for campaigns to win a political party's presidential nomination. Years before the nomination is formally made at a party's national nominating convention, potential candidates for the nomination explore their possibilities. They consult with advisors. They size up their likely competitors, both in their own party and the candidate from the opposing party who they might face in the general election. They talk with supporters and those who might contribute financially to their campaigns. They weigh their options: the likely costs and benefits, politically and personally, for the immediate election and down the road. Then they make their decision either to throw their hat in the ring, as Theodore Roosevelt colorfully described it, or to sit it out. Out of these individual deliberations, typically made more than a year in advance of the election, comes the field of candidates for the nomination contest.²

Once a candidate has decided to seek a party's nomination, the race is on, at least for that candidate. He or she must then recruit a campaign staff, clarify the campaign's message (the reason why voters in the party should choose him or her rather than someone else), raise millions of dollars to fund the campaign so that the message can get out to potential voters, develop a strategy to use the campaign's resources most effectively within the rules of the nomination process, and assemble a network of supporters and campaign workers across the nation and particularly in those states thought to be most important to winning the nomination. In order to win a party's nomination, a candidate must devise a strategy for winning a majority of delegates selected in the states through party caucuses and primary elections. In 2004, Democrats selected 4,353 delegates to their national nominating convention and Republicans selected 2,509 to theirs.³ For most candidates, the nomination strategy means devising a way to win, or at least to exceed expectations, in the early nomination contests so that they can gain additional contributions, receive more media attention for their campaigns, attract more supporters, and drive opponents out of the race.

Even before a vote is cast in a caucus or primary, candidates try to develop positive expectations about their candidacies among the media and activists. They must cultivate an image as a viable candidate; someone that primary voters should seriously consider supporting. This is particularly important in a crowded field of contenders. This phase of the campaign has been called "the invisible primary" and the winner of the invisible primary (as seen in the pre-primary polls) is the candidate to beat for the nomination.⁴

The official process of selecting delegates begins with the Iowa caucuses in late January of the election year and a week later with the New Hampshire

presidential primary. The process of delegate selection across the individual states (mostly by primary elections) extends for several months. In 2004, the official delegate selection process ended with a set of primaries in early June, about five and a half months after the Iowa caucuses. The nomination process officially ends when the delegates nominate the party's presidential candidate at the parties' national nominating conventions, traditionally held in July and August.

In reality, the nomination process is not this long. Although a few states still select delegates late in the spring and into the early summer months, most have moved their delegate selection processes earlier in the year to gain greater influence. This compression or front-loading of the delegate selection calendar is the result of many individual state and state party decisions. States that select their delegates later in the year (in April, May, or June) found that the eventual nominee had usually accumulated enough delegate votes to win the nomination before the state even held its primary or caucus. The incentive has been clear: If people want their state to matter in determining the parties' presidential nominees, they must select the state's delegates early in the year before the nominations are effectively settled. In 2004, 24 of the 36 states holding Democratic Party presidential primaries held them by the middle of March. Three-quarters of the delegates were selected in the seven weeks following the New Hampshire primary.⁵

This front-loading of the primary and caucus schedule has been a huge boon to front-running candidates. The compressed schedule now requires candidates to run in a large number of states at once, a feat only a candidate with a large national organization and lots of money can do well. The front-loading of the primaries and caucuses prevents long-shot candidates from exploiting early victories and gaining momentum. A frontrunner has the resources to recover from a setback; a lesser-known candidate does not have the time to gain significantly greater recognition, organizational strength, and resources before the next set of primaries and caucuses are conducted. As William Mayer has observed, "Not since Jimmy Carter's campaign in 1976 has a momentum-driven candidacy been successful"; and Carter's emergence from the pack of Democratic hopefuls in 1976 was before the front-loading of primaries began.⁶

The campaign financing system also provides a considerable advantage to front-running candidates, especially if they are able to raise enough money that they can afford to forgo federal matching monies (as George W. Bush, Howard Dean, and John Kerry did in 2004) and the regulatory strings that go with those funds. Long-shot candidates who accept federal matching funds for their contributions must observe numerous restrictions on how much they can spend in different states. As a result, these candidates are forced by the campaign financing system to pursue a sub-optimal campaign strategy. That is, they must comply with restrictions on how much they can spend in different states as opposed to what might be the best strategy of spending to increase their chances of winning the nomination. Combining the front-loaded nomination calendar and the campaign financing system, the current nomination

system is one that looks open to many candidates (lured into the process by the apparent openness of the primary dominated system) but is in reality a system strongly inclined toward frontrunners (when there is a frontrunner) and one that settles on a nominee several months before the summer conventions. The conventions, aside from establishing the party's platform on the issues and ratifying the choice of a vice-presidential candidate for the ticket, have evolved into more of a kickoff for the general election campaign than the close of the nomination process.

ALL NOMINATIONS ARE NOT EQUAL

As Lord Bryce observed, the nominating process in choosing the parties' presidential candidates is an important "act of choice." This is true as far as it goes, but it does not go far enough in reflecting the relation of the nominating system and the electoral process. The nomination system should be understood as part of the electoral process, rather than a distinct process providing the candidates for the general election. For a presidential candidate, the issue is not just *whether* you win your party's nomination, but *how* you win it. A presidential candidate's prospects in the general election hinge to a great extent on the amount of internal party unity coming out of the nomination. This is as true today—when nominations are effectively decided in the first few weeks in a flurry of presidential primaries and caucuses—as it was in the old days, when nominations were actually decided at the parties' national conventions.

A candidate who emerges from the nomination process with a unified party has five substantial advantages over a candidate who lacks a unified party at the outset of the general election campaign: votes in the bank, strategy, turnout, resources, and ammunition.

First, a substantial majority of voters decide how they will vote before the general election campaign gets underway. In the typical election between 1952 and 2004, about 43 percent of voters reported that they decided how they would vote before the conventions, and another 21 percent said they decided during the conventions.⁷ In 2004, more than 70 percent of voters indicated that they had decided before or during the party conventions. A candidate with a unified party providing a significant base of committed voters to work from has a shorter distance to go in assembling an electoral majority than a candidate with smaller group of committed followers at the start of the campaign.

A unified party in the nomination phase of the campaign also provides a candidate with a strategic advantage. Elections cannot be won with the party's most loyal voters alone (its base) but cannot be won without them. Candidates must shore up support from those most likely to support them but then must reach out to win the votes of those undecided and swing voters. A candidate who already has a secure base has a head start in trying to win over uncommitted and wavering voters. Without a unified party, the candidate must build some enthusiasm in his or her base of support while simultaneously reaching

out to swing voters. This is no easy task, particularly when appeals to the party's loyalists are generally more ideological than those that might appeal to more centrist voters.

A party unified at the outset also suggests greater enthusiasm for the candidate, and this may lead to higher partisan turnout on Election Day. On the other hand, a candidate whose partisans indicate more tepid support at the start of the campaign may have a more difficult time mobilizing these partisans to vote. Although most partisans will vote (if sometimes grudgingly), some of those who have mixed feelings about their party's nominee at the outset may not muster the effort to vote. Previous research indicates that the turnout rates of party identifiers of the winning presidential party are higher than otherwise expected, and the turnout rates of party identifiers of the losing presidential party are lower than otherwise expected.⁸

A candidate who is not seriously challenged for the party's nomination has the advantage also of directing campaign finances toward the cause of the general election campaign. A candidate fighting for the nomination does not have this luxury. Without a secured nomination, campaign money must be directed at fending off challengers within the party. The clearest recent example of this difference was the 1996 campaign. Whereas President Clinton was essentially unopposed for the Democratic Party's nomination, Senator Bob Dole had to battle a significant group of opponents for the GOP nomination. While Clinton used \$30.4 million (not to mention substantial "soft money") essentially to get a head start to the general election campaign, Dole was forced to use his campaign's resources (\$34.5 million) on battling his Republican opponents for the nomination.⁹

A candidate having a unified party at the outset also has an ammunition advantage of sorts. In a hotly contested nomination battle, fellow partisans make charges against each other that can be used by the opposing party's candidate during the general election campaign. One of the clearest examples of ammunition for the opposition coming out of a divided nomination contest is from the 1980 campaign. In the general election that year, Democrats frequently reminded voters that George Bush, Reagan's running mate and former competitor for the Republican nomination, had called Reagan's economic proposals "voodoo economics." Four years later, President Reagan used ammunition supplied in the Democratic nomination battle against his opponent, former Vice President Walter Mondale. While campaigning in Ohio in 1984, Reagan attacked Mondale's record by using charges leveled against him in the nomination campaign by nomination foe Senator Gary Hart. Reagan told the crowd: "My opponent has done a very good job of slipping, sliding, and ducking away from his record. But here in Ohio during the primaries, Senator Gary Hart got his message through by reminding you, the Ohio voters, of the true record. And I quote—he said, 'Walter Mondale may pledge stable prices, but Carter-Mondale could not cure 12 percent inflation.' 'Walter Mondale,' he added, 'has come to Ohio to talk about jobs, but Carter-Mondale watched helpless as 180,000 Ohio jobs disappeared in the period between 1976 and 1980.' Now I didn't say that. Those are Gary Hart's words."¹⁰

NOMINATIONS AFFECT ELECTIONS

While these are plausible advantages for a candidate coming out of a more unified nomination process, do they really make a difference? What is the evidence that divided nomination campaigns and party disunity before the general election actually harms the nominee's chances of attracting votes in the general election? A number of studies have examined divisive primaries at the state level and have generally found that they hurt a candidate's vote in the general election, though there is some disagreement as to whether party disunity existing before the primary or disunity caused by the primary make the difference.¹¹ Martin Wattenberg has also examined the impact of party disunity with an interesting (but somewhat ad hoc) index of "nomination fighting" and concluded that "the candidate with the most united party won every election from 1964 to 1988."¹² In this section, we will examine the impact of party unity in presidential nominations on general election results over 136 years of electoral history using two different national measures of party satisfaction with its presidential candidate at the time of the nomination.

Unified or Divided Conventions

One measure of party unity in the nomination process is whether a majority of the party's convention delegates voted for the eventual nominee on the convention's first ballot. Although every convention since 1956 has produced a first ballot nomination, multiple ballots were common in earlier conventions. In the 22 presidential elections from 1868 to 1952, the major parties held 44 national conventions. The nomination was settled on the first ballot in 26 of these conventions, but at least a second balloting of the delegates was required in 18 conventions.¹³ Of these 18 cases, we set aside elections in which a first ballot nomination was denied a candidate with a majority of delegate votes (because of the Democratic Party's two-thirds rule), elections in which multiple ballots were required in both parties' nominations, and the 1912 election in which the Republican Party was so divided that it split before the renomination of President William Howard Taft. This leaves nine presidential candidates in these 22 elections (41 percent of the elections) who were nominated by a divided convention (no first ballot majority) while their opponent was nominated on the first ballot of the opposing party's convention. Table 11.1 lists these nine, the lack of party unity about their nominations as reflected in the convention voting, and their fates in the general election. These are the candidates who might have been disadvantaged in the general election by party divisions over the nomination.

As the table indicates, the parties were more divided over some of these nominations than over others.¹⁴ Probably the least divided of these divided conventions was the Republican convention of 1948. New York Governor Thomas E. Dewey, having won the Republican nomination four years earlier, went into the 1948 convention with 40 percent of the delegates supporting him on the first ballot.¹⁵ His closest competitor for the nomination, Senator

TABLE 11.1**Elections with One Divided Major-Party Presidential Nominating Convention, 1868–1952**

Year	Presidential Nominee	Political Party	Number of Ballots to Nomination	Nominee's Delegate Percent on 1st Ballot	Percentage of the Two-Party Popular Vote	General Election Outcome
1868	Horatio Seymour	Democratic	22	0 —	47.3	Lost
1876	Rutherford B. Hayes	Republican	7	8 (5th)	48.5	Won
1888	Benjamin Harrison	Republican	8	10 (4th)	49.6	Won
1896	William Jennings Bryan	Democratic	5	15 (2nd)	47.8	Lost
1916	Charles Evans Hughes	Republican	3	26 (1st)	48.4	Lost
1924	John W. Davis	Democratic	103	3 (15th)	34.8	Lost
1940	Wendell L. Willkie	Republican	6	11 (3rd)	45.0	Lost
1948	Thomas E. Dewey	Republican	3	40 (1st)	47.7	Lost
1952	Adlai Stevenson	Democratic	3	22 (2nd)	44.6	Lost

Note: A divided nominating convention is one in which multiple ballots were required to select the nominee, and the nominee did not have a majority of delegates on the first ballot. In two Democratic Party conventions (1876 and 1932) the nominee had a first-ballot majority, but multiple ballots were required because of the party's two-thirds rule. Both major parties had divided conventions in 1880, 1884, and 1920. Also, because of the Republican progressive bolt to Teddy Roosevelt's campaign in 1912, both parties are considered as having divided nomination contests in that year. The number beside the nominee's delegate percentage on the first convention ballot is the ranking of the eventual nominee on that first ballot.

Robert A. Taft of Ohio, however, was a distant second with 20 percent of first ballot votes, and when Dewey picked up another 7 percent of the delegates on the second ballot, the momentum to a third ballot nomination was unstoppable.

At the other end of the spectrum were far more divided nominations. In 1868, Democratic Party delegates cast 22 ballots before turning in desperation to New York Governor Horatio Seymour who had received no delegate votes on the first ballot and only 7 percent of votes on the 22nd ballot before delegates switched their votes to make him the nominee. But perhaps the most

divided nomination was the Democratic nomination of John W. Davis of New York in 1924 after 17 days and 103 ballots. The convention turned to Davis only after it became apparent that the northern urban wing of the party and the southern rural wing of the party could not abide each other's nominees.¹⁶

Despite differences in the extent of internal party divisions in the nomination period, candidates emerging from a divided nomination process (whether badly or horribly divided) clearly do not do well in the general election that follows.¹⁷ Of the nine candidates who lacked a majority of delegate votes going into their party's nominating conventions, only two were elected president: Hayes in 1876 and Harrison in 1888. In terms of the national popular vote, none of the nine presidential candidates received a popular vote plurality. Both Hayes and Harrison became presidents by virtue of their electoral vote majorities, but their opponents (Tilden and Cleveland) received more popular votes nationwide. The record could hardly be clearer: Parties divided over their nominations are in big trouble in the general election.

The Loyalty of Early Deciding Partisans

Although party divisions over its presidential nomination are less evident in national nominating conventions since 1952 (with the notable exception of the 1968 Democratic convention and possibly the 1964 Republican and 1972 Democratic conventions), the degree of party unity before the general election campaigns can be gauged more directly and accurately for recent campaigns through survey data. In every election since 1952, the American National Election Study (NES) has asked a national sample of voting age Americans about their party identification, if and how they voted for president, and when they decided how they would vote. Using these data, we can determine the percentage of party identifiers in both parties who decided how they would vote at or before the parties' nominating conventions and decided to vote for their party's candidate. This provides the basis for a relative measure of party unity at the time of the nominations. In many respects, this is the best measure of whether a party was truly divided in its nomination or otherwise failed to select a candidate who could generate enthusiasm within the party.¹⁸ The relative index is computed as the percentage of early deciding Democrats who reported that they voted for the Democratic presidential candidate minus the percentage of early deciding Republicans who reported that they voted for the Republican presidential candidate.¹⁹ A positive value indicates that Democrats were more unified around their nominee than Republicans were around theirs, and a negative value indicates that the Republicans exhibited more early party unity. Normally at least 85 percent of those who decide how they will vote before or during the conventions end up voting for their party's candidate, with early loyalty rates being a bit higher among Republicans.²⁰ Nevertheless, despite high rates of loyalty by early deciders within both parties, varying degrees of enthusiasm for their party's nominee cause differences in how uniformly loyal these early deciding partisans are from year to year.

The extent of party unity at the time of the nomination reflects several conditions. It reflects both the absolute enthusiasm for the party's nominee and the relative enthusiasm for the nominee compared to other candidates who competed or might have sought the party's nomination as well as reactions to candidates in the opposing party. It also reflects the roughness of the nomination campaign and any lingering ill will from it. Finally, it reflects the effectiveness of the nomination end game and the convention in reunifying the party behind its standard bearer. Conventions typically provide their nominees with a convention bump in the polls, especially for the party that was less unified and trailed in the polls.²¹ A candidate who appeals to the party faithful more than the alternatives in or outside the party, has won the nomination without political bloodshed, and has energized the party with a positive nominating convention should have his or her party's early deciding voters firmly behind him or her and be well positioned to make a strong race in the general election.

Figure 11.1 plots the index of relative Democratic Party early unity against the Democratic candidate's actual national popular vote. It is clear that the relative extent of unity within the party at convention time is related to how well the party's candidate does in the November election. Going into the fall campaign, the more unified a party is relative to the opposing party, the greater the expected vote for its candidate. Historically, a party's presidential candidate can expect about 4 percentage points more of the two-party vote in November for every 10 percentage points of greater party loyalty than the opposition at the end of the nomination process. Moreover, the election's outcome hinges more on the relative party unity of those who decided how they would vote at the time of the nomination than the extent of party loyalty of those who decide how they will vote after the parties' nominating conventions.²²

Each party benefitted by a large difference in party nomination unity in one election in this era. For the Democrats that election was 1964. That year, 95 percent of Democratic Party identifiers who said that they decided how they would vote at the time or before the national conventions voted for their party's candidate Lyndon Johnson. Republicans that year faced a revolution from the right in the candidacy of Senator Barry Goldwater from Arizona. Goldwater's unabashed conservatism conveyed in his convention speech proclaiming "extremism in the defense of liberty is no vice," and his campaign slogan that "in your heart, you know he's right" threatened the party's moderates. Only 78 percent of the Republicans who decided how they would vote before the fall campaign began (about half of all Republicans) voted for Goldwater—compared to normal GOP loyalty rates in the middle to upper 90 percent range among early deciders. The relative disunity doomed the Goldwater candidacy.

At the other end of the early loyalty difference spectrum, Republicans enjoyed a large party unity advantage going into the 1972 campaign. Although Nixon had nominal opposition en route to his renomination, his support among early deciding Republicans was almost perfect (about 98.7

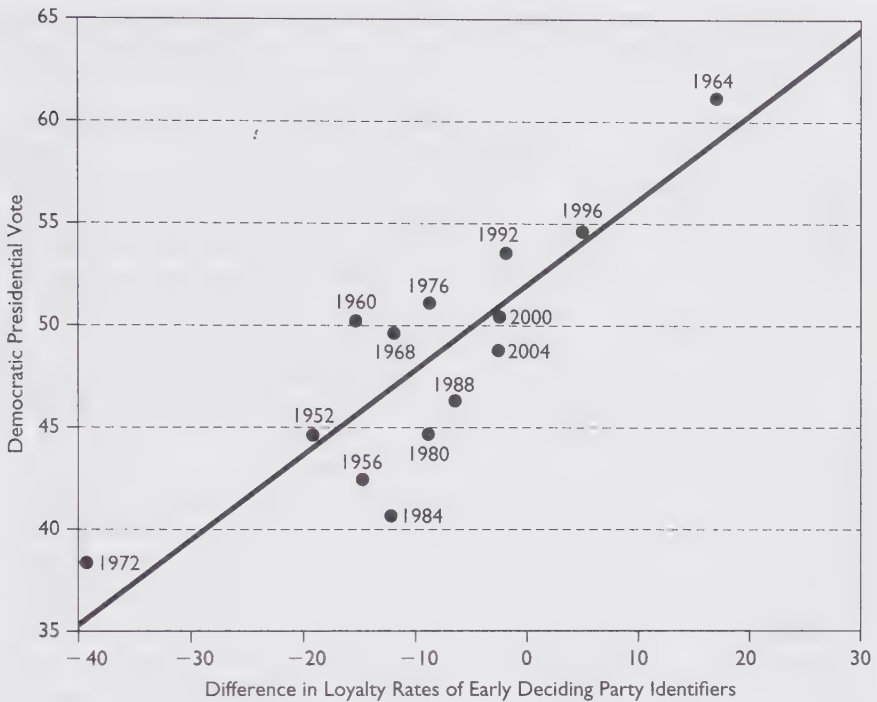


FIGURE 11.1

Party Unity of Early-Deciding Party Identifiers and the General Election Vote, 1952–2000

Difference in Loyalty Rates of Early-Deciding Party Identifiers

Note: The Democratic presidential candidate's vote is the percentage of the two-party national popular vote. The difference in loyalty rates of the early-deciding party identifiers is computed as the percentage of early-deciding Democrats who reported voting for their party's candidate minus the percentage of early-deciding Republicans who reported voting for their party's candidate. Early deciders are those who indicated that they decided how they would vote at the time of or before the national conventions and who did not change their reported vote from their earlier stated vote intention. The data are from the National Election Studies and have been adjusted to the known national vote division. See Campbell, 2000, Appendix B and p. 98 entries for the 2000 election computed by the author. The regression of early loyalty difference and the general election vote has a constant of 52.15, a slope of .42 ($P < .001$), and an adjusted R-square of .73 ($N = 13$).

percent). The Democratic Party, in contrast, was in disarray. Much as Goldwater's candidacy had represented the conservative wing of the Republican Party, the candidacy of Senator George McGovern of South Dakota in 1972 represented the liberal wing taking control of the Democratic Party, alienating the party's moderates. Only 59 percent of early deciding Democrats voted for McGovern in 1972. Even when the extreme cases of 1964 and 1972 are set aside, the relative degree of party unity at the end of the nomination process is clearly important to the general election results.²³

As noted previously, Republicans have generally benefitted from greater early party unity than Democrats over this period, though this appears to be changing. Of the 14 elections, Democrats were more united at the outset than Republicans in only two cases—the 1964 election and the 1996 Clinton-Dole race, both involving White House incumbents. In three other elections, the 1992 Clinton-Bush-Perot election, the 2000 Bush-Gore election, and the 2004 Bush-Kerry election, loyalty rates at the outset only mildly favored the Republicans. Overall, Democratic presidential candidates won popular vote pluralities in four elections in which they started the campaign with a party unity deficit. In 1992, with the help of the Perot candidacy and with just a slim Republican unity advantage (owing perhaps to the Buchanan nomination candidacy as well as Perot), Clinton defeated Bush (the elder). The other three Democratic vote pluralities without an early loyalty edge (1960, 1976, and 2000) were all very narrow.

The most raucous nomination battle of this period (and perhaps any other) was the 1968 Democratic nomination of Vice President Hubert Humphrey during the height of the Vietnam War protests. Protesters and the police in the convention city of Chicago battled in the streets, and bad tempers raged in the convention hall itself. While moderate liberals and more radical liberals fought for the nomination, the southern conservative wing of the party deserted to support Alabama Governor George Wallace as a third-party presidential candidate. While this divisive nomination battle undoubtedly hurt the party with its base and with potential swing voters, loyalty rates of early deciding Democrats were not as low as they had been in the 1950s when Dwight Eisenhower attracted Democratic voters away from Adlai Stevenson or as they would be four years later when George McGovern appeared too liberal to many party moderates. Nevertheless, early deciding Democrats were about 12 percentage points less committed to Humphrey than early deciding Republicans were to Nixon. The impact of the 1968 nomination battle was also evident elsewhere. The nomination conflict kept many Democrats from making an early decision. A smaller percentage of Democrats in 1968 had decided their votes at the time of the nomination than in any other election from 1952 to 2004; and of those Democrats who held off deciding, a smaller percentage ended up voting for the Democratic presidential candidate (54 percent) than in any other year. The end result was that Humphrey was unable to pull the badly damaged Democratic majority coalition together in time for the November vote and Republican Richard Nixon narrowly won the election.

In general, the differences in the degree of pre-campaign party harmony are not as great as they once were. In each of the six elections from 1952 to 1972, there were double-digit differences between the early loyalty rates of Democrats and Republicans for their respective standard-bearers. In the eight elections since 1972, only the Republicans in their support of President Reagan in 1984 had more than a 10-point advantage over their opponent in early party unity. Whether the result of the polarization between the parties causing disagreements within the parties to be set in perspective, or parties becoming more adept at handling internal divisions, or the partisan realignment making

each party more ideologically homogeneous, the unity differences between the parties in recent elections have not been as pronounced as they had been.²⁴

The Usual Beneficiary of Early Party Unity

If early party unity (whether exhibited by first-ballot nominations or by higher loyalty rates among early deciding partisans) is important for later electoral success, what candidates tend to enjoy an easy nomination, and what candidates tend to have a tougher time pulling their party together? Although situations within the parties change from year to year and with the ambitions and opportunities afforded various candidates under changing nomination methods and rules, incumbent presidents usually have an easier route to the nomination and a more united party as the fall campaign gets underway.

The incumbency advantage in having a unified party in the nomination stage of the election is evident in both the divided convention and the party loyalty of early deciding partisans. None of the nine presidential candidates in Table 11.1 who lacked a delegate vote majority on the first ballot of their nominating conventions were incumbents. In fact, none of the 17 presidential candidates who were nominated at multiple-ballot conventions from 1868 to 1952 were incumbent presidents.²⁵ In this span of history, there were only two exceptions to incumbents having a unified party. The first exception was the Republican Party in 1912 in which former president Theodore Roosevelt split from the Republican Party, leaving incumbent President William Howard Taft with only part of the Republican Party and a humiliating third-place finish in the general election (winning only the eight electoral votes of Utah and Vermont). The other exception was the Democratic Party in 1948, in which Democrats on both the left—under former Vice President Henry Wallace—and on the right—under South Carolina Governor Strom Thurmond—split from the party. President Harry Truman was left with the colossal task of pulling the party's coalition back together over the course of the campaign—a feat that he was able to accomplish. Nevertheless, Taft and Truman are the exceptions. Most incumbents have unified parties in their renomination and reelection campaigns.

Party unity behind incumbents is also generally evident in the voting loyalty of early deciding partisans in Figure 11.1. In elections since 1952, the relative early party unity for incumbents was about nine points higher than it was for their challengers.²⁶ Eight of the nine incumbents in this period entered the fall campaign season with a more unified party than their challengers.²⁷ This early unity advantage for incumbents translates into about a three-point advantage in the November vote. This is not to say that incumbents can take for granted a united party at the nomination stage. Incumbents have not always had an easy path to nomination. President Jimmy Carter in 1980 faced a serious challenge from Senator Edward M. Kennedy of Massachusetts. Republicans that year had an eight-point unity advantage among early deciding partisans, even though they had a crowded and contentious battle for their nomination. Reagan was opposed by George H. W. Bush, Howard Baker, and John Anderson, among others.

President Bush (the elder) in 1992 did not have an easy time of it either. Although Republicans who decided their votes early overwhelmingly supported his reelection (about 95 percent), many were unsure enough about their support that they held off making their decision. While typically more than 60 percent of Republicans have decided how they will vote at or before conventions, fewer than half of voting Republicans in 1992 felt comfortable enough about their candidate to reach an early decision. The only other modern election in which so few Republicans made an early decision was in 1964 when Lyndon Johnson defeated Republican Barry Goldwater in a landslide.

The Carter and Bush cases aside, incumbents since 1952 have had strong and early party backing from their party and this has helped their general election runs.²⁸ Eisenhower in 1956, Johnson in 1964, Nixon in 1972, Reagan in 1984, Clinton in 1996, and G. W. Bush in 2004 all had their parties firmly behind them as they embarked on their reelection runs.

LOOKING BACK AT 2004 AND AHEAD TO 2008

Outcomes of general elections depend a great deal on the unity of the parties coming out of the nomination stage of the campaign. The candidate with the more unified party is better positioned to attract votes in the general election and incumbents normally have the more united party going into the election. This proved to be the case, albeit only slightly, in 2004. Both parties had grown polarized and were solidly unified behind their standard bearers before the campaign began, but Republicans were a bit more enthusiastic and united front in their support of President Bush than Democrats were for Senator Kerry.

On the Republican side, conditions favored party unity. President Bush was unopposed for renomination. Despite concerns about the conduct of the war in Iraq and about job creation at home, conditions tilted in favor of his re-election, and the case was felt particularly strongly within his party. Objective economic conditions were not much different from what they had been in 1996 when President Clinton was re-elected; a substantial majority of Americans favored Bush over Kerry when it came to conducting the war against terrorism.²⁹ Although President Bush's pre-campaign approval ratings with the general public were unimpressive (high 40s to low 50s), his standing with Republicans was rock solid. Among Republicans, the President's approval rating averaged an stratospheric 90 percent in Gallup polls from January through May, never dipping below 88 percent. Still mindful of the Clinton years and the razor-thin victory of 2000, Republicans rallied to Bush. Three-quarters of Republican partisans decided how they were going to vote before or at the time of the conventions, and 97 percent of them voted for President Bush, almost two points higher than in 2000. Republican unity and enthusiasm was also reflected in the number of Republicans reaching early vote decisions. Three-quarters of all Republican voters in 2004 decided how they would vote before the

campaign began, a 16-percentage-point increase over 2000. Finally, Republicans' enthusiasm was evidenced in their turnout. For the first time since the NES began conducting their election year surveys in 1952, strong Republicans outnumbered strong Democrats among voters (though not among all respondents), and Bush carried the nine states in which turnout increased the most over 2000.

Nomination politics for the Democrats in 2004 were more complicated, but the party was also united as it entered the fall campaign. Unlike the Republicans, Democrats in 2004 had a wide field of candidates contesting for their party's nomination. Ten candidates sought the party's presidential nomination, with former Vermont Governor Howard Dean emerging as "the candidate to beat." This changed dramatically, however, in the week before Iowa. Democrats turned away from Dean and toward Senator John Kerry of Massachusetts. Kerry's more reserved and temperate demeanor convinced many Democrats that he had a better chance of defeating President Bush. Kerry finished first in both Iowa and New Hampshire. His support snowballed in the states that followed. Even with the front-loading of the nomination system, Kerry's momentum set him squarely on a course for the Democratic Party's presidential nomination.

Although the crowded field of candidates and their changing fortunes might suggest disarray among the Democrats, it was quite to the contrary. The party was uncertain about its leadership but not divided over it. The great concern among Democrats was for their candidate's electability. This spurred the overnight exodus from Dean to Kerry. Democratic Party unity was grounded in three factors. First, Democrats were unified ideologically. Both Democratic candidates and voters easily pledged their support for the party's standard bearer without reservation. Second, Democrats and Republicans were polarized, standing poles apart ideologically. With Democrats clearly the liberal party and Republicans clearly the conservative party, partisans saw a greater threat from the election of the opposition. This difference also had a personal dimension. Many Democrats had demonized President Bush from the time of his election and desperately wanted to avenge their loss in 2000. Finally, Bush was considered beatable, but not easily so. This made party unity of added importance to Democrats. Although there were some reservations about Kerry being too liberal, 70 percent of Democrats decided their vote before or at the time of the conventions (5 percent fewer than Republicans), and 92 percent of them (again, about 5 percent less than Republicans) supported their party's candidate. Democrats were slightly more united than they were in 2000 behind Al Gore but still not quite as united as the Republicans. With the number of partisans on each side now near parity, this slight early unity difference was important to President Bush's re-election.

As we look at the 2008 presidential election, there are a number of differences from 2004. Most notably, with President Bush completing his second term, there is no incumbent in the race. Unlike 2004, the Republican field is wide open with no clear favorite, at least not several years away from the

election. Circumstances are a bit different on the Democratic side. Though there are a number of candidates likely to seek the Democratic Party's nomination, many observers consider Senator Hillary Clinton to be the early front-runner for the Democratic nod. Will Republicans divide over their nomination while Democrats unite behind the former first lady? If recent elections serve as a guide, both parties will fall squarely in line behind their candidates and the nomination of Senator Clinton may do as much to unite the Republicans as to unite the Democrats. American politics is now so polarized that upward of 70 percent of both Democrats and Republicans will decide which party they will vote for by the time of the conventions (if they have not already done so) and upward of 90 percent of them will stay with their party—whoever its nominee is. The only real question is how far “upward” both of these numbers are for each party, because in another close election that can spell the difference.

ACKNOWLEDGMENTS

The author thanks Roger Davidson and Bill Mayer for their comments on an earlier version of this chapter.

ENDNOTES

1. James Bryce, *The American Commonwealth*, 2 Vols. (New York: Macmillan, 1891) v. 2: 170.
2. Michael G. Hagen and William G. Mayer, “The Modern Politics of Presidential Selection: How Changing the Rules Really Did Change the Game,” in William G. Mayer, ed., *In Pursuit of the White House 2000: How We Choose Our Presidential Nominees* (New York: Chatham House, 2000), p. 25.
3. According to Wikipedia at http://en.wikipedia.org/wiki/U.S._presidential_nominating_convention (accessed October 1, 2005), there were 4,353 delegates and 611 alternates attending the 2004 Democratic National Convention in Boston between July 26 and 29 of 2004 and 2,509 delegates and 2,344 alternates attending the 2004 Republican National Convention in New York City between August 30 and September 2.
4. Arthur T. Hadley, *The Invisible Primary: The Inside Story of the Other Presidential Race: The Making of the Candidate* (Englewood Cliffs, NJ: Prentice-Hall, 1976). William Mayer also notes that “in seven of the last 10 contested nomination races, the eventual nominee was leading in the polls for at least a year before the Iowa caucuses.” See William G. Mayer, “Forecasting Presidential Nominations or, My Model Worked Just Fine, Thank You,” *PS: Political Science and Politics*, 36 (April 2003): 155.
5. Michael L. Goldstein, *Guide to the 2004 Presidential Election* (Washington, DC: CQ Press), p. 35–6.
6. Mayer, “Forecasting Presidential Nominations or, My Model Worked Just Fine, Thank You,” p. 155. See also, Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York, Alfred A. Knopf, 2002): 114–15. John Kerry's wresting of the Democratic Party's frontrunner mantle from

Howard Dean in 2004 indicates that frontrunners are not invincible, at least before they have established their bona fides in an actual caucus or primary.

7. James E. Campbell, *The American Campaign: U.S. Presidential Campaigns and the National Vote* (College Station, TX: Texas A&M University Press, 2000): 8. The data are originally from the American National Election Studies from 1952 to 2004. The 2000 and 2004 time of decision for voters was calculated by the author.
8. James E. Campbell, *The Presidential Pulse of Congressional Elections*, second edition. (Lexington, KY: University Press of Kentucky, 1997): 183.
9. Stephen J. Wayne, *The Road to the White House 2000: The Politics of Presidential Elections* (Boston, MA: Bedford/St. Martin's, 2000): 54.
10. Ronald Reagan, *Public Papers of the Presidents of the United States*. (Washington, D.C.: U.S. Government Printing Office, 1987): 1511.
11. See, Richard Born, "The Influence of House Primary Election Divisiveness on General Election Margins, 1962-76," *The Journal of Politics*, 43 (August 1981): 640-55; Patrick J. Kenney and Tom W. Rice, "The Relationship between Divisive Primaries and General Election Outcomes," *American Journal of Political Science*, 31 (February 1987): 31-44; and James I. Lengle, Diana Owen, and Molly W. Sonner, "Divisive Nominating Mechanisms and Democratic Party Electoral Prospects," *The Journal of Politics*, 57 (May 1995): 370-83. See also, Lonna Rae Atkeson, "Divisive Primaries and General Election Outcomes: Another Look at Presidential Campaigns," *American Journal of Political Science*, 42 (January 1998): 256-71. Atkeson examines the national effects of divisive primaries and finds no significant effect once economic and presidential evaluations are taken into account. Her study ranges from 1936 to 1996. The problem with these findings is that primary divisiveness probably said very little about nomination divisiveness when primaries were a minor component in the nomination process, as they were before 1972. For example, Lyndon Johnson in 1964 had highly unified party behind him, but ran in very few primaries and received less than 18 percent of the primary total vote (see, Moore, Preimesberger, and Tarr, *Congressional Quarterly's Guide to U.S. Elections, fourth edition*, v. 1: 350). Several others have claimed that the same factors hurting a candidate's nomination success or primary vote also hurt the candidate's general election vote and that the divisiveness of the nomination is a reflection of party disunity rather than a cause of it. See Andrew Hacker, "Does a 'Divisive' Primary Harm a Candidate's Election Chances?" *American Political Science Review*, 59 (March 1965): 105-10; James E. Piereson and Terry B. Smith, "Primary Divisiveness and General Election Success: A Re-Examination," *The Journal of Politics*, 37 (May 1975): 555-62; and William G. Mayer, *The Divided Democrats: Ideological Unity, Party Reform, and Presidential Elections* (Boulder CO: Westview, 1996), pp. 43-71. Although these studies indicate that the expression of party disunity (by the divided primary vote) is not the major cause of party disunity in the nomination phase, the analyses do not rule out nomination divisiveness as contributing to or reinforcing disunity. The main point here, in any case, is that party disunity, however caused, at the time of the nomination is extremely damaging to the general election prospects of the nominee.
12. Martin P. Wattenberg, "The Republican Presidential Advantage in the Age of Party Disunity," In Gary W. Cox and Samuel Kernell, *The Politics of Divided Government* (Boulder, CO: Westview Press, 1991), pp. 39-55. Wattenberg creates a five point index of nomination fighting from four dummy variables based on a rough coding of whether there were early primary contests, late primary contests, a convention battle, and a healing vice presidential choice. The index was coded

- for the 14 candidates in the seven elections from 1964 to 1988. I examined the difference in Wattenberg's index for candidates running in the same year and compared it to the early loyalty difference index. The two were surprisingly highly correlated ($r = .85$), adding a degree of confidence in both measures.
13. The data on the conventions and delegate vote counts come from Moore, Preimesberger, and Tarr, *Congressional Quarterly's Guide to U.S. Elections*, v. 2: 441–641.
 14. These divided nominations were about as likely to be in the Democratic Party (4) as Republican Party (5) and were about as likely to involve running against an incumbent (5) as running for an open seat (4).
 15. Like the 1912 election, the 1948 case might also be set aside because the Democratic Party splintered before its first ballot nomination of Harry Truman. The southern conservative wing bolted and ran Strom Thurmond as a Dixiecrat candidate and the progressive wing bolted and ran former Vice President Henry Wallace as a presidential candidate. Even without the 1948 case, the record of divided conventions of one party is eight major party candidacies without a single popular vote plurality.
 16. For a colorful history of the 1924 Democratic convention see Robert K. Murray, *The 103rd Ballot: Democrats and the Disaster in Madison Square Garden* (New York: Harper and Row, 1976).
 17. For an alternative assessment of the impact of divided conventions see Paul T. David, Ralph M. Goldman, and Richard C. Bain, *The Politics of National Party Conventions* (Washington, DC: The Brookings Institution, 1960), pp. 221–39.
 18. The ideas of a divisive nomination and the lack of party unity at the nomination stage are conceptually distinct. That is, a party may not be unified behind its nominee because of a divisive nomination process or some other reason. It is quite possible that the nomination process failed to generate enthusiasm for a candidate because of the candidate, the candidate's positions on the issues, or the candidate's poor prospects for election. The point here is that whatever causes a lack of party unity at the time of the nomination, that disunity is very harmful to the candidate's chances in the general election.
 19. The NES data have been corrected for their differences from the actual reported presidential popular vote. Leaning independents are counted as party identifiers with the party they lean toward. The adjustments and the adjusted data used to compute the loyalty rates are in Campbell, *The American Campaign: U.S. Presidential Campaigns and the National Vote*, pp. 62–3, 98, appendix B. Because third-party support can draw votes from a party's candidate, loyalty rates were based on votes for all candidates. The 2000 and 2004 data were calculated by the author from the NES studies. The 2000 early loyalty rate for Democrats was 92.4 percent and the early loyalty rate for Republicans was 95.3, for a difference of 22.9 percentage points. The 2004 early loyalty rate for Democrats was 94.1 percent and the early loyalty rate for Republicans was 96.9, for a difference of 22.9 percentage points.
 20. Wattenberg in "The Republican Presidential Advantage in the Age of Party Disunity" using a very different measure also finds that Republicans throughout much of this period exhibited greater unity in support of their presidential candidate than did Democrats.
 21. James E. Campbell, Lynna L. Cherry, and Kenneth A. Wink, "The Convention Bump," *American Politics Quarterly* 20 (July 1992): 287–307; and Campbell, *The American Campaign: U.S. Presidential Campaigns and the National Vote*,

- pp. 145–51. The updated analysis of the later study indicates that frontrunners (those with more unified parties) typically have received about a 4 percentage point boost in the polls after their conventions, while trailing candidates (those with less unified parties) typically get a 7 percentage point bump. The analysis finds that about a third of the net bump carries through to the November vote and two-thirds is dissipated in the weeks following the conventions.
22. A regression accounting for variance in the Democratic candidate's two-party popular vote was estimated using the relative loyalty differences among early deciding party identifiers and the relative loyalty differences among late deciding party identifiers (those deciding their votes after the conventions or changing their vote from their pre-election vote intention). The coefficients for the loyalty differentials were .34 for the early deciders and .20 for the late deciders (with standardized coefficients of .73 for the loyalty of early deciding partisans and .35 for the loyalty of late deciding partisans). Both were statistically significant at $p, .02$, one-tailed and the adjusted R^2 was .81 ($N = 14$). Adding the difference of the percentage of Democratic and Republican identifiers voting increases the adjusted R^2 to .98. The difference in early party loyalty was again the most important variable, more important than the difference of the percentage of Democratic and Republican party identifiers in the electorate. The standardized coefficients were .74 for the early loyalty difference, .51 for the later loyalty difference, and .41 for the difference of the percentages of Democratic and Republican identifiers among all voters.
 23. Excluding both the 1964 and 1972 landslides, an equation with both the early and late party loyalty differences and the difference of the percentage of Democratic and Republican party identifiers in the electorate still accounts for 98 percent of the vote variance. The standardized coefficients were .47 for the early loyalty difference, .80 for the later loyalty difference, and .52 for the difference of the party identifiers among voters.
 24. I discuss the staggered realignment toward competitive balance in "Party Systems and Realignments in the United States, 1868–2004," *Social Science History*, forthcoming.
 25. These include the nine candidates in Table 11.1 plus the seven of the eight candidates nominated by multiple-ballot conventions in elections in which both parties had divided conventions (1880, 1884, 1912, and 1920) and the two candidates nominated by multiple-ballot conventions even though they had a first-ballot majority (Tilden in 1876 and Franklin Roosevelt in 1932).
 26. The 8.9 percentage point advantage in early party unity for incumbents is the median value of the early party loyalty difference between each of the nine incumbent-candidates and their challengers between 1952 to 2004.
 27. President Carter in 1980 was the exception who had a less unified Democratic Party than his opponent Ronald Reagan.
 28. Two other cases in recent times also may qualify for incumbent trouble. President Lyndon Johnson in 1968 undoubtedly would have faced a seriously divided party had he sought renomination. Also, President Gerald Ford in 1976 faced a serious challenge from Ronald Reagan. Despite this challenge however, Republicans were more united at the close of the nomination process in 1976 than were Democrats. Jimmy Carter's emergence from a crowded field of Democrats that year left many Democrats still skeptical at the time of the nomination.
 29. I evaluate the evidence of the pre-campaign conditions more thoroughly in "Why Bush Won the Presidential Election of 2004: Incumbency, Ideology, Terrorism, and Turnout," *Political Science Quarterly* 120 (Summer 2005): 219–41.

Reading 12

A High Speed Chase: Presidential Aspirants and the Nomination Process

LARA M. BROWN

The modern presidential nomination process tends to be both chaotic *and* fairly predictable.¹ Like watching the police pursue a car at high speeds on television, the anticipation derives from knowing what could happen (a fiery crash or a shootout) rather than from what usually does (an arrest). Mesmerized by the chase, viewers often wonder whether the lead car will escape, hit another vehicle or drive off the road. Similarly, though election observers know that few frontrunners lose their party's nomination, most continue to entertain such questions as: who has the momentum; who has the most money; who holds the lead in the polls; which state contests will matter most for which presidential aspirant; and whether the frontrunner will stumble, an underdog will attack, or a dark horse will emerge?

This contradictory state of affairs grew out of the reform efforts that began with the McGovern-Fraser Commission in 1968, and led to the proliferation of state primaries and party caucuses,² but is largely attributable to one consequent trend: front-loading (the propensity of more and more states to schedule their nomination contests early in the electoral cycle), which shows no signs of abating in the near future.³ Prior to describing the effects of front-loading and the 2008 primary campaigns of John McCain and Barack Obama, this essay reviews the history of the nomination process and the reforms undertaken to include more rank-and-file partisans in the quadrennial national party conventions from the perspective of the presidential aspirants.⁴ Even though the national political parties lost control of the calendar in 2008 and have made new attempts to stretch the 2012 nomination cycle, this high speed chase, which began in earnest in 1980, is still underway. Thus, although nomination races run along wild courses and may be described as "volatile,"⁵ they tend to produce unsurprising results: frontrunners win.

ROAD CONSTRUCTION: THE HISTORICAL DEVELOPMENT OF THE NOMINATION PROCESS

The Constitution provides no mechanism for nominating presidential candidates.⁶ Instead, it describes a selection process whereby temporary electors from each state (chosen in a method devised by their state legislature) meet in their respective states, vote for president (later this also included vice president), and send their sealed ballots to Washington.⁷ If no candidate receives a majority of the electoral votes cast, then the House of Representatives (voting

by state delegation, rather than by individual member) selects the president, choosing from the five (later this number was reduced to three) candidates who earned the most electoral votes.⁸

Reflecting on these procedures, it appears that the Framers thought that future candidates worthy of the position would be honorable men of national standing (similar to George Washington), who would wait for the Congress to inform them of the electors' (or if need be the House's) choice for president.⁹ It seems they also believed that the Electoral College, as these procedures came to be known, would deter unsavory cabals¹⁰ and deny unworthy candidates of the office.¹¹ This federal structure of temporary electors, however, ended up making presidential aspirants, who proved ambitious and creative, more political than reticent. Looking to secure an electoral vote majority, presidential aspirants expanded and exploited the two nascent political parties (Federalists and Republicans).¹² Further, once the parties were developed, then only partisans could credibly vie for the presidency. As John H. Aldrich explains: "The standard line that anyone can grow up to be president may be true, but it is true only if one grows up to be a major party nominee."¹³ Thus, since at least 1796 (if not since 1792), presidential aspirants have had to first capture their party's nomination (win the confidence of enough of their fellow partisans to become the nominee), if they desired to win the presidency (use the party apparatus to gain the majority of electoral votes in the states).

While the current process for securing the nomination from one of the major parties is quite complex (governed by federal laws, state laws, and party rules, which often change between election cycles), it began rather informally. A small network of notable citizens who shared a similar governing philosophy and were active in national politics, coalesced around one candidate they felt was worthy of the presidency.¹⁴ After the 1796 election, however, when a lack of party coordination among the Federalists resulted in Thomas Jefferson, the Republican nominee, becoming the vice president under John Adams, the Federalist nominee, the political parties began to formalize their nominating processes.¹⁵

In 1800, members of Congress met in partisan caucuses to recommend party nominees for president. This method, known as the "King Caucus," continued for several cycles, eventually failing in 1824. It had likely worked because the country was relatively small and the national political elite—mostly members of the "founding generation"—were highly esteemed. The Federalists last nominated a candidate, Rufus King, in the 1816 election. When President James Monroe ran for reelection in 1820, the Republicans had no organized opposition (he earned all but one of the electoral votes cast). By 1824, however, factions had grown within the Republican Party and each supported a different candidate for president. Further, few partisans continued their support for the "King Caucus" process.¹⁶ Later that year, Andrew Jackson, a prominent former general who had served during the War of 1812, earned a plurality of electoral votes, but lost the presidency to Secretary of State John Quincy Adams, who was chosen by the House of Representatives. Adams's presidential selection provided the final blow to the legitimacy of the congressional caucus, which had chosen Treasury Secretary William Crawford over the other, better known contenders: Adams, Jackson, and House Speaker Henry Clay.

With no formal process in place prior to the 1828 election, Andrew Jackson, who decided to run again, secured resolutions supporting his nomination from several state legislatures. While these state legislative endorsements likely served as a precedent for inviting state delegations to select a nominee at national conventions, the Anti-Mason Party provided the model for a national party convention in 1831.¹⁷ The following year, the Democratic Party (formerly the Democratic Republicans) held its first national convention. The Whigs (formerly the National Republicans) followed suit in 1836, and when the Republican Party formed in the 1850s, they also adopted this tradition in 1856. Quadrennial national party conventions have been held ever since. Even though these national conventions opened up the parties to state-based elites, participation by rank-and-file partisans was rare. National delegates were chosen at state and local conventions, which were controlled by party bosses. Further, most of the political decisions at the national convention were made in the “smoke-filled backrooms” by these party bosses, who served as their state’s delegates and who traded their votes for favors, such as federal pork and patronage.

In 1896, Republican presidential aspirant William McKinley—aware of the growing sentiment favoring electoral reforms, such as voter registration and a secret ballot, and looking for a way around the party machines—ran on a slogan of “the People against the Bosses.” He won the Republican Party’s nomination by garnering the delegate votes of southern Republicans, who had mostly been neglected by the national party’s elite.¹⁸ He went on to win the presidency. While McKinley altered the power base within the Republican Party, the Progressive Party led the nation in opening up the presidential nomination process to more voters. In 1901, Florida’s legislature enacted a law, allowing rank-and-file partisans to vote for national convention delegates. Fifteen years later, in 1916, presidential primary elections were held in 26 states.¹⁹ Even though the national conventions in these years became more representative of rank-and-file partisans, party elites continued to determine their outcomes. Not only were these delegates chosen in primaries not bound to vote for any specific candidate, but the primary elections themselves had not attracted as much support as the reformers had thought they would (turnout was often low). During the 1930s, many states repealed their statutes. In addition, Franklin Roosevelt—as both an aspirant and a president—pushed for several organizational reforms in the Democratic Party, encouraging a more “professional” approach to politics and campaigning.²⁰ While his new structures and personnel undermined many of the party bosses, it also entrenched a new group of party elites who were active and involved between elections, meaning that rank-and-file partisans were again excluded. Eventually, primary elections came to be regarded as the vehicles by which a presidential aspirant could demonstrate his or her electoral viability to these party elites. In 1960, for instance, John F. Kennedy, a Catholic, showed he was electable with his strong performance in primaries (especially in Protestant West Virginia).

In 1968, Vice President Hubert Humphrey won his party’s nomination after a raucous national convention in Chicago that included protestors, riots, and

police brutality. The turmoil erupted in part because Humphrey had not entered any primary elections. While he had the support of President Lyndon Johnson and the convention delegates, he did not have the support of the rank-and-file activists or the anti-war (Vietnam War) wing of the party who were not represented inside the convention hall in large numbers.²¹ The convention delegates attempted to resolve the party's split by forming a commission to consider and propose new nomination rules. George McGovern, a senator from South Dakota and a presidential aspirant who had challenged Humphrey for the nomination after Senator Robert F. Kennedy had been assassinated, was named the chair.

The McGovern-Fraser Commission (Donald Fraser, a representative from Minnesota, took over for McGovern when the latter decided to run for the 1972 presidential election) came forward with recommendations in 1970 that required states to: ensure that delegates were chosen in the same year as the convention; give "adequate public notice" about delegate selection; include individuals as delegates who had traditionally been discriminated against (affirmative action); and use proportional representation in the awarding of pledged delegates to candidates in primaries and caucuses. In the years following the commission's report, several states adopted presidential primaries because they ensured that the composition of the state's delegation would not be challenged by the national party as violating the "fair reflection rule."²² By 1976, more than 70 percent of delegates were awarded in these types of contests.²³ The Democratic rules were modified again after the 1980 election to formalize the "window" for holding nominating contests, establish a threshold percentage of the vote for earning delegates, and create a new group of delegates who could change their votes at any time, called superdelegates or PLEOs—party leaders and elected officials. These latter reforms came about because the national party felt that some of the reforms in place in 1972 and 1976 had not worked as they had hoped.²⁴

The changes made to the state laws governing the Democratic Party's nomination process more often than not ended up impacting the Republican Party's nomination process because throughout most of the 1970s and 1980s, Democrats controlled the majority of state legislatures. Hence, by 2000, both parties selected over 85 percent of their national delegates through primary elections in over forty states.²⁵ Even though the Republicans maintain some differences in their procedures (no affirmative action requirement, no PLEOs, and until the 2012 cycle, most states awarded delegates using winner-take-all rather than proportional representation²⁶), both parties appear to be struggling with front-loading—the major consequence of all of these reforms.

A WILD COURSE: THE FRONT-LOADED NOMINATION CYCLE

As was mentioned at the outset, front-loading has both predictable and chaotic effects. On the predictable side, front-loading tends to increase the cost of elections; stretch the length of the electoral cycle; compress the decisive time-frame; and depress turnout in states that come later in the process. Taken together, these

trends have led to what many have said is a less deliberative nomination process because the voting tends to be over nearly as quickly as it begins.²⁷ Front-loading also helps lock-in aspirants who lead in the early public opinion polls, amass large numbers of elite endorsements, receive ample media coverage, and raise substantial sums during the “invisible primary”²⁸ time frame.²⁹ These aspirants become known as frontrunners, and as Andrew E. Busch and William G. Mayer note: “Of all the candidates who have been nominated since 1980, *every one* of them can plausibly be regarded as, if not *the* front-runner, at least one of the top-tier candidates.”³⁰ This list of frontrunners includes not only incumbent presidents who ran for reelection (Reagan in 1984, G. H. W. Bush in 1992, W. J. Clinton in 1996, and G. W. Bush in 2004), but also partisans who were thought to be an heir apparent (G. H. W. Bush in 1988, Dole in 1996, Gore in 2000, and G. W. Bush in 2000). That said, there have been cycles where front-runners lose (Humphrey in 1972 and 1976, Hillary Clinton in 2008); outsiders capture momentum (Reagan in 1976, Kennedy in 1980, McCain in 2000, and Dean in 2004); and dark horses catch the light late and win (Dukakis in 1988, Clinton in 1992, and Kerry in 2004).³¹ It is just that typically these events occur before the majority of voters have either cast a ballot or even noticed that there are nomination races underway, which undermines the intended purpose of the reforms. Stephen J. Wayne aptly summarizes: “The only consensus [among scholars] seem[s] to be that the caucus and primary system as it evolved was haphazard, arbitrary, and unfair—certainly no way to run a democratic nomination.”³²

Still, a front-loaded nomination process that relies on aspirants earning delegates by winning pluralities in primary elections (or caucuses) in nearly every state is not a staid production. State parties (and state legislatures) tend to do battle with each other and the national parties as they attempt to secure an early spot on the nominating calendar, which provides them with the opportunity to disproportionately influence the process and garner tangible benefits, like increased media coverage, economic gains, and specific policy concessions from the aspirants.³³ With the exceptions of the Iowa caucuses and the New Hampshire primary—contests that have traditionally been held first³⁴—each election cycle produces a different ordering, as well as clustering of the states, which tends to confuse not only elected officials, party leaders, and journalists, but also the candidates and the voters. This confusion is multiplied by the fact that each state determines the electoral rules and timelines for its nomination contest (whether they will hold a primary or a caucus, the number of signatures required to be on the ballot, amount of the filing fee, filing deadline, absentee and early vote procedures, etc). This situation requires each presidential aspirant to have a flexible and competent campaign staff who can stay on top of the varying rules and processes of each state.

Providing an example, Table 12.1 compares the 2000 nomination calendar with the 2008 calendar. In 2000, Iowa was in January, New Hampshire was in February, and fifteen contests were held on March 7, designated “Super Tuesday.”³⁵ By the end of February, twelve states had voted. In 2008, five contests were held in January alone, including Iowa and New Hampshire on the third and the eighth of the month, and twenty-four contests were held on February 5, or “Tsunami Tuesday.” By the end of February, forty-three contests had taken

TABLE 12.1**Comparison of the 2000 and 2008 Presidential Nomination Contest Calendars**

2000	State Contest	2008	State Contest
		January 3	Iowa
		January 5	Wyoming (R)
		January 8	New Hampshire
		January 15	Michigan
		January 19	Nevada
			South Carolina (R)
January 24	Iowa		
	Alaska (R)	January 26	South Carolina (D)
		January 29	Florida
February 1	New Hampshire	February 1	Maine (R)
February 5	Delaware (D)	February 5	Alabama
			Alaska
			Arizona
			Arkansas
			California
			Colorado
			Connecticut
			Delaware
			Georgia
			Idaho (D)
			Illinois
			Kansas (D)
			Massachusetts
			Minnesota
			Missouri
			Montana (R)
			New Jersey
			New Mexico (D)
			New York
			North Dakota
			Oklahoma
			Tennessee
			Utah
			West Virginia (R)
February 8	Delaware (R)	February 9	Kansas (R)
			Louisiana
			Nebraska (D)
			Washington*

(continued)

TABLE 12.1 (CONTINUED)

2000	State Contest	2008	State Contest
		February 10	Maine (D)
		February 12	District of Columbia Maryland Virginia
February 19	South Carolina (R)	February 19	Hawaii (D) Washington Wisconsin
February 22	Arizona (R) Michigan (R)		
February 27	Puerto Rico (R)		
February 29	North Dakota (R) Virginia (R) Washington		
		March 4	Ohio Rhode Island Texas Vermont
March 7	California Connecticut Georgia Hawaii (D) Idaho (D) Maine Maryland Massachusetts Minnesota (R) Missouri New York North Dakota (D) Ohio Rhode Island Vermont		
March 9	South Carolina (D)	March 8	Wyoming (D)
March 10	Colorado Utah Wyoming		
March 11	Arizona (D) Michigan (D) Minnesota (D)	March 11	Mississippi
March 12	Nevada (D)		
March 14	Florida Louisiana		

TABLE 12.1 (CONTINUED)

2000	State Contest	2008	State Contest
	Mississippi		
	Oklahoma		
	Tennessee		
	Texas [*]		
March 21	Illinois		
March 25	Alaska (D)		
April 4	Pennsylvania		
	Wisconsin		
April 15–17	Virginia (D)		
April 22	Kansas (D)	April 22	Pennsylvania
May 2	District of Columbia		
	Indiana		
	North Carolina		
		May 6	Indiana
			North Carolina
May 9	Nebraska		
	West Virginia		
		May 13	Nebraska (R)
			West Virginia
May 16	Oregon		
		May 20	Kentucky
			Oregon
May 23	Arkansas		
	Idaho (R)		
	Kentucky		
		May 27	Idaho (R)
		June 3	New Mexico (R)
			Montana [*]
			South Dakota
June 6	Alabama		
	Montana		
	New Jersey		
	New Mexico		
	South Dakota		
		June 7	Puerto Rico (D)

^{*}Washington held caucuses on February 9, 2008, where fifty-one percent of Republican delegates were selected and one hundred percent of Democratic delegates were selected. The state also held a primary election on February 19, 2008. Similarly, Republicans held caucuses and selected delegates in Montana on February 5, 2008. The state also held its primary on June 3, but the outcome of this contest for Republicans was non-binding.

Sources: Information adapted from the National Association of Secretaries of State, *Primary Calendar*, January 15, 2008 update, see http://nass.org/index.php?option=com_content&task=view&id=74&Itemid=210 (accessed February 8, 2008) and from *Presidency2000: Calendar of Elections and Events*, see: <http://www.politics1.com/primaries2k.htm> (accessed February 8, 2008).

place. Contrasting these more recent cycles with 1976 provides another stark contrast: Iowa held their caucus in late January and New Hampshire held their primary in late February, and then only five states held contests in March. Thus, a large majority of states held their contests between April and July.

Since a front-loaded system tends to advantage the frontrunner, presidential aspirants frequently find themselves in a position where they cannot afford to wait—for fear that the candidate field becomes too settled—to jump into the race. Practically speaking, many visibly begin campaigning the day after the midterm election, though several spend many more years positioning for a run. Aspirants compete with one another for money, media attention, professional consultants, and campaign staff. On the trail, they look to win the support of party notables (e.g., governors and major donors), affiliated interest groups, and rank-and-file activists. Generally, the better the aspirant does in all of these competitions for resources, attention, and advocates, the more likely they are to prevail in the nomination contests. Thus, aspirants work hard and start early, trying to earn and sustain the frontrunner designation.

During the invisible primary, these competitions are the focus of the media's coverage. Journalists report on the "horse race" (who is leading, gaining, or falling behind in the polls—where, and by how much) and rely a great deal on what may be thought of as campaign gossip (who has endorsed whom, who is working for whom, and whose positions are winning over the party's activists) for evidence. They also use the candidates' quarterly fundraising reports and the public opinion polls as evidence of the aspirants' standing in the contest. The problem with these measures, however, is that they tend to reinforce the frontrunner's advantage. Poll favorites—frontrunners—have an easier time obtaining contributions and media attention, which then leads to higher poll numbers, more money, and more media attention. This snowball effect tends to continue through a front-loaded calendar until the numerous rapid-fire contests affirm that frontrunners tend to win party nominations. Augmenting this effect, frontrunners are often better able than their opponents to capitalize on any momentum generated from winning (or beating expectations) as well as rebound from any stumble because they tend to be better positioned both financially and organizationally.³⁶

It could, however, be worse. Not the front-loading, which is likely to continue into the foreseeable future, but its results—that well-known, experienced politicians who are strategically inclined, tactically competent, tireless workers are those who tend to win nominations. For although it appeared to some as if Senator Barack Obama came out of nowhere to claim the Democratic nomination in 2008, as Howard Reiter shows, he was in second place (in opinion polls and raising money) throughout 2007. In short, "front-loading produced predictable results for the Democrats" in 2008 even though the Republican contest was unusually "volatile."³⁷

More generally, it seems fair to say that while the reforms have encouraged front-loading and led to a less deliberative process, they have also increased the representativeness of the delegates at the national party conventions and the number of partisans engaged in presidential nominations—two

of the reformers' stated goals.³⁸ Thus, although many are still dissatisfied with the nomination process because they believe that they either do not wield sufficient influence on their party's decision (i.e., those who participate in contests that occur later on the calendar often are not able to affect the nomination) or do not have enough candidates from which to make meaningful decisions (few aspirants continue to campaign after Iowa and New Hampshire), more Americans have more opportunities to weigh in on the choice of their party's nominee and hoped for president than at any time in the country's history. Further, as Stephen J. Wayne points out, the 2008 cycle was a banner year for democracy, even though "the political environment, not the party rules," was more responsible for this result.³⁹

NEW TWISTS AND TURNS: THE 2008 PRESIDENTIAL ELECTION

Although the 2008 nomination contests led to relatively predictable outcomes (top tier aspirants became party nominees), they were anything but dull. As was suggested previously, the cycle produced two of the most exciting high speed chases (sustained competition among the Democrats and "volatile" competition among the Republicans) anyone had seen in a generation. Nomination battles occurred on both sides of the partisan aisle—the first time since 1952—because there was not a clear successor to President George W. Bush. This "open seat" presidential race drew nine aspirants to run in each party. These aspirants—all aiming for frontrunner status—started their campaigns as early as they ever had. By the end of January 2007, most candidates had launched their official committees (exploratory committees were thought passé this time around) and announced their campaign teams. They had also rolled out sophisticated websites, launched "viral" advertising (producing and uploading Internet videos), and started actively courting potential donors, endorsers, and voters more than one year before Iowa's caucus contest on January 3, 2008.

Contributing to the cycle's chaos, the national political parties lost control of the nomination calendar. In previous elections, the national political parties had been able to persuade the states to schedule their contests during the established window, which usually opened up a few weeks after the New Hampshire primary. In 2008, however, as late as fifty days before the originally scheduled date for the Iowa caucus (January 14), the order and the dates of the early contests were still fluctuating. While twenty-four states complied with national party rules, scheduling their primaries or caucuses on February 5, having all of them do so on that first Tuesday in the window made this day the most important for winning delegates (nearly half of all pledged delegates in both parties were available on this day alone (1,676 out of 3,512 for Democrats and 1,038 out of 2,454 for Republicans)).⁴⁰ The front-loading was unprecedented.

Another race among the states—for January dates—played out during the cycle and evinces just how much the national parties had lost control.

In late 2006, the Democratic Party voted to allow South Carolina and Nevada—states whose electorates were more diverse than Iowa or New Hampshire—to hold early contests.⁴¹ This decision fostered envy and resentment among several other states, which led to more “turf wars” between the states and the national parties. Florida Democrats sued the Democratic National Committee (DNC) over the date of their primary (January 29), which had been scheduled by a Republican-controlled state legislature and signed into law by a Republican governor (with the tacit support of the state’s Democrats), but had been placed on a day before the national party’s established nomination window opened on February 5. Republicans in South Carolina, displeased by the actions of their fellow partisans in Florida, moved up their primary (January 19) and voted on a different day than the Democrats in their state (January 29). Annoyed with the leapfrogging of Florida and South Carolina, the Republicans and Democrats in Iowa moved up their caucuses from January 14 to January 3. Michigan, which had been one of the states that had initiated the cause of more representative states (ones that included urban centers with large minority populations) voting early, moved up its primary to a date (January 15) before not only the Democratic window, but also the established date for the Nevada caucus (January 19). New Hampshire’s Secretary of State William Gardner waited until Michigan’s State Supreme Court had ruled that Michigan would be allowed to hold its primary on January 15 before he announced in late November the date of the Granite state’s primary (January 8). Complicating the situation further, both Iowa and New Hampshire operate under state laws that required them to schedule their contests at the front of the nomination calendar, which meant they were forced to move up their contests.

In response to these maneuvers, the Democratic National Committee asked the presidential aspirants not to campaign (but they were allowed to solicit funds) in either Michigan or Florida. It then told both rogue states that if they proceeded with their plans, they risked not having their delegates seated at the Democratic Party’s national convention. The Republican National Committee followed suit and told these states that they would lose half of their convention delegates. The states ignored these warnings and admonitions. They knew their delegates would have their convention credentials restored eventually, which indeed, they did.⁴² In short, the states (and their delegates) knew they would not be disinvented from the convention because neither the Democratic nor the Republican nominee would be able to afford angering a state’s most active partisans just a few months before the general election.

Amidst these organizational challenges, credible candidates (e.g., Senators Joseph Biden, Chris Dodd, and Sam Brownback and former Senator Fred Thompson) abounded. Although the parties fielded nine aspirants apiece, most political observers kept watch on three from each side of the partisan aisle. The Republicans were Senator John McCain, former Massachusetts Governor Mitt Romney, and former New York City Mayor Rudolph Giuliani. The Democrats were Senators Hillary Clinton and Barack Obama and former Senator John Edwards. These were the top tiers in each party at the start of the

invisible primary, and as the two campaign sketches below demonstrate, it was from within these elite strata that the frontrunners were named and the presidential nominees were selected. Further, it is useful to note that these candidates began in the top tier because of their previous political experience, biographical appeal given the historical context, and substantial pre-campaign planning and positioning.⁴³ Again, no matter how chaotic the ride, the nomination process still ends rather predictably.

IN HIGHWAY TRAFFIC: THE REPUBLICAN NOMINATION OF SENATOR JOHN MCCAIN

The early conventional wisdom suggested that the Republicans were on their way to a drawn-out three-way contest between McCain, Romney, and Giuliani because no one was sure which ideological moderate (or recently converted social conservative) evangelical Christians, an important faction within the Republican Party, would choose to support.⁴⁴ None thought former Arkansas Governor Mike Huckabee would be in the mix until he placed first in Iowa with over 34 percent of the vote. His success in the caucuses gave his candidacy a burst of momentum that helped him raise about \$16 million and made him the favorite of conservatives across the South. While McCain came in fourth, few expected him to do well in the Hawkeye State. Had Huckabee raised more money and been able to organize in more states early on, particularly in South Carolina where he came in second and in Illinois and Missouri on Super Tuesday, he may have won the Republican nomination. But then again, had he been able to raise more money and organize a larger campaign, more pundits may have viewed him as a possible frontrunner from the outset. In the end, Huckabee's candidacy hurt Romney the most, which meant that it helped McCain, who because of early missteps had been forced to follow what his advisor Charlie Black told him was a "sophisticated strategy . . . be the last man standing."⁴⁵

While Romney finished second in Iowa, he might as well have finished last. His campaign strategy had been a traditional one. He invested a lot of time and money in Iowa and New Hampshire, calculating that if he won both, they would provide him with enough momentum to win the nomination. Solely considering the calendar, he was in the best position of the Republicans at the outset of the contests. His affiliation with the Mormon religion and his work with the Olympic Games in Salt Lake City would boost his efforts in the western contests (Wyoming and Nevada). His family roots would help him in Michigan. His business contacts and gubernatorial service in Massachusetts would benefit him in New Hampshire. In sum, he held an advantage in four of the six early contests, so long as he won the first one. He, however, had a difficult time attracting Iowa's social conservatives to his candidacy because of his previously held moderate stances on policy, including on abortion.⁴⁶ Whereas Romney won Wyoming, Michigan and Nevada, he only placed second in New Hampshire, which meant that he lost the two states he needed to win. After spending more than \$113 million and winning only seven (Alaska, Colorado, Massachusetts, Minnesota, North Dakota and Utah) of the 21 contests on Super Tuesday, he dropped out on February 7.

Giuliani fared worse than Romney. Despite having spent more than \$65 million on his campaign, he did not place above third in any of the first seven contests. His strategy had been to stay on the sidelines until Florida and to focus on the big states holding contests on Super Tuesday (e.g., California, New York, New Jersey). His campaign, however, hoped that he would do well enough in New Hampshire to provide him with the momentum he would need to secure his position in the Sunshine State. In the Granite State, he came in a disappointing fourth—behind Huckabee—and earned just eight percent of the vote. What was worse was that his campaign had spent time and money in New Hampshire, believing that their efforts would bring down Romney (whom they thought would win Iowa), which would then help them “stretch the election out another month.” Hence, Huckabee hurt Romney in Iowa, and Giuliani drug down Romney in New Hampshire. Even though Giuliani had succeeded in “stretching the election,” when the votes were counted in Florida, he came in third behind both McCain and Huckabee. The following day, January 30, he dropped out.⁴⁷

McCain’s path to the nomination was the rockiest a Republican had experienced since Reagan in 1980. As was mentioned, many observers believed he was the one to beat. Early on, Democrats had even hoped McCain would be the GOP nominee because he was “the most visible supporter” of the troop surge strategy in Iraq adopted by Bush in January 2007. Later, when the strategy led to reduced violence and greater stability, the Democrats found themselves on the defensive, trying to explain how it was that they, like former Senator John Edwards, had once thought that “the McCain doctrine ... [was] dead wrong.” To his credit, McCain for months stood behind his foreign policy expertise and against public opinion polls, even saying in a television interview that he “would much rather lose a campaign than lose a war.” This comment, his other high-profile policy stances (e.g., in favor of campaign finance reform and against the Bush administration’s use of torture), and his compelling personal history as a prisoner of war in Vietnam, provided the backdrop for his campaign’s message: “Country First.” Although events later turned his way, during the first months of 2007, McCain was the “leader of the pack, but he was alone and unhappy.” Contributing to this perception, McCain raised only about \$12.5 million in the first quarter. The other top tier aspirants (Romney, Clinton, and Obama) had each raised more than \$20 million in the same period. During the spring and early summer, McCain’s prospects worsened. When the second financial quarter closed, he reported bringing in fewer funds than he had in the first quarter (\$11.2 million) and having only \$2 million cash on hand. In short, McCain was thought to be on the ropes, losing.⁴⁸

Starting in July, after wide-ranging staff cuts and a major reorganization, McCain took hold and began repositioning his campaign. In his favorite role—underdog—he focused on his favorite early state: New Hampshire. Having won the state in 2000, he believed he could win it again. He held town hall meetings, met with newspaper editorial boards, and methodically made his way around the Granite State. In a September debate, he attacked Romney when Romney sounded hesitant about the success of the surge strategy.

Slowly his poll numbers there began to rise, and by mid-December he had cut Romney's double-digit lead down near the margin of error. In a debate three days before the primary, McCain again hit Romney, attacking him this time for adopting a "change" message, after seeing that it was working for Obama. He said: "We disagree on a lot of issues. But I agree. You are the candidate of change." When the results were tallied, McCain defeated Romney by more than 13,000 votes (five percentage points).⁴⁹

After New Hampshire, McCain's comeback tour made a misstep in Michigan. Instead of ceding the state to Romney and turning his attention to South Carolina, McCain contested it, placing too much faith in his campaign's momentum. When Romney bested him there by over 80,000 votes (nine percent of the total vote) the Republican nomination race reopened, rather than closed. By this point, the winners of the first four contests were three different aspirants.

Within this context, South Carolina's primary grew in importance. McCain had lost the state to Bush in 2000, and many questioned whether he would be able to prevail, or whether a strong showing by Thompson might further throw affairs into confusion. But, according to *Washington Post* Journalists Dan Balz and Juliet Eilperin, McCain was in a good position. He had "wooed the GOP establishment in the early stages of the race" and in the few days before the election, he had stumped with "South Carolina House Speaker Bobby Harrell and state Attorney General Henry McMaster along the coast, the more moderate area of this conservative state." When the returns came in, McCain edged Huckabee by about 15,000 votes (3 percent). Though Romney won Nevada on the same day, the media were focused on South Carolina.⁵⁰

Once again, McCain took to the stage as the frontrunner, and the Republican hopefuls turned their attention to Florida. While Giuliani had largely disappeared from view, Huckabee and Romney redoubled their efforts, knowing that the Sunshine State's primary would determine how Super Tuesday played out. McCain understood that "he needed to ratify his South Carolina success—and Florida's primary, unlike those in New Hampshire and South Carolina, was closed to Independents." Further understanding that Romney was a more significant long-term threat (because of his money) than Huckabee, McCain again attacked Romney, suggesting that Romney was not committed to winning in Iraq. McCain also earned last-minute endorsements from two of the state's most popular Republicans: Senator Mel Martinez and Governor Charlie Christ. On January 29, McCain pulled nearly 100,000 more votes than Romney.

As expected on the heels of Florida, Super Tuesday turned into a super day for McCain. He won nine of the 21 contests, including most of the big states like California and New York, and racked up over 550 delegates. With the writing on the wall, Romney dropped out. The race continued for another month, but few considered Huckabee's candidacy viable at that point. On March 4, McCain earned enough delegates to secure the "presumptive nominee" title, and in early September, he claimed his party's official nomination at the national convention.

As noted previously, the Republican nomination contest was "volatile" and for a time, it seemed as though the race was the equivalent of a traffic jam.

No one appeared to be going anywhere fast. By the end of January, it was a three-way race between McCain, Romney, and Huckabee that ran at highway speeds and left some of the more talked about candidates (e.g., Giuliani and Thompson) in the dust. In the end, McCain won mostly because he had prevailed in South Carolina, which had set the stage for Florida and the Super Tuesday contests. Thus, the front-loading and the subsequent momentum he garnered from winning kept him alongside of Huckabee, who did not have time to organize, and ahead of Romney, who did not have time to rebound from his losses in Iowa and New Hampshire.

THROUGH BACK ROADS: THE DEMOCRATIC NOMINATION OF SENATOR BARACK OBAMA⁵¹

The understanding at the outset of the race, in January 2007, was that it was likely to be a “Democratic Year.” Aside from President George W. Bush’s consistently low approval ratings and the public’s belief that the country was headed down the wrong track, Democrats had led on average by double-digits on the generic ballot question for over a year, which, as ABC News pollster Gary Langer explains, was “remarkable in what has mostly been a 50/50 nation.”⁵² Further, as a result of the ongoing wars in Afghanistan and Iraq, many believed that senatorial (with its shared jurisdiction over the nation’s foreign policy) as opposed to gubernatorial experience would likely be preferred by the voters. Owing to the more junior status of her two most serious Democratic competitors (Obama was in his first term and Edwards had only served for one term, a total of six years in political office), the expectation was that Clinton might very well win both the nomination and the presidency. Throughout 2007, she led in the polls, and it was not until November, a mere two months before Iowa, that Obama began closing the double-digit percentage gap.⁵³ The Democratic contest between Clinton and Obama not only ended in a somewhat surprising victory for Obama, but also, unlike other recent nomination races, lasted all the way until June and seemed to travel on nearly every back road in America.

Heading into the Iowa caucuses, there was great deal of uncertainty. Clinton’s internal polling showed her edging out Obama (32 to 31) with Edwards in third (28), while the final *Des Moines Register* poll, which had been right in 2004, showed “Obama with a clear lead and projecting a big turnout.” To win a caucus, one needs to “stack it,” or overwhelm it with numbers. Obama’s campaign did that, bringing many who had not voted before to the polls. Turnout reached nearly 240,000 people; the campaigns had only planned for about 160,000. Obama had been helped by the fact that the date of the caucuses had been moved up to January 3 because students from Illinois and Iowa were still home for the holidays and were able to help his campaign turn out supporters. When the results were announced, Clinton came in third: Obama earned 37.6 percent, Edwards had 29.8, and Clinton had 29.5.

Although Clinton lost her frontrunner status, she continued to have a front-runner’s organization working for her, including in New Hampshire, where

her team had constructed a “firewall.” Obama’s win in Iowa had more fatally wounded Edwards. His investment in the state had created enormously high expectations for him and when he failed to come within a few points of the winner, most assumed he would shortly drop out of the race. His decision to continue his campaign hurt Clinton through the rest of January. For instance, in South Carolina, Clinton and Edwards split white voters along gender lines, who together comprised 43 percent of the electorate. This led to Obama’s seemingly overwhelming victory in the state (Obama earned 55 percent, Clinton earned 27, and Edwards earned 18) because of his ability to attract both men and women minority voters. There had also been rumors flying around about Edwards engaging in an extra-marital affair at the time that his wife was undergoing cancer treatment, which turned out to be true. Its revelation would have sunk his campaign. Hence, had Edwards dropped out after Iowa, Obama may not have had the momentum that he did going into Super Tuesday and he may not have “survived.” Edwards helped Obama in the way that Huckabee and Giuliani helped McCain—by taking down the competition (“the enemy of my enemy is my friend”).

Knocked back on her heels, Clinton hit the ground hard in New Hampshire. She walked door-to-door, held town halls, and staged large rallies. Her opponents—Obama and Edwards (the other credible contenders with the exception of New Mexico Governor Bill Richardson had exited the contest after Iowa)—also overplayed their hands. In the New Hampshire debate the Saturday before the voting, they went after her, making her more sympathetic, especially to women. Then on Monday, when her emotions—and a few tears—burst through on the trail and Edwards was unsympathetic (“Presidential campaigns are a tough business, but being president of the United States is also very tough business.”), there was a backlash. While few thought Clinton would be able to win the state—there had not been enough time—Obama’s “riding the momentum” and Edwards’s “hammer the nail in the coffin” strategies failed. On Election Day, Clinton, like McCain, made a comeback. She earned 39 percent of the vote to Obama’s 37 percent (Edwards earned 17 percent). Thus, the race was a toss-up between the two winners.⁵⁴

The problem for Clinton was that the next state that was voting—Michigan—had been penalized and told that none of the state’s delegates would be seated at the national convention because they had jumped ahead of the opening of the contest window. Florida had also been penalized for its early date, and as such, the media framed the next significant contest as South Carolina, essentially skipping past the Nevada caucuses, which Clinton won on January 19. Clinton received negative press coverage for not removing her name from the ballot in Michigan, as Obama had done, and for allowing her supporters in Florida to mount a local grassroots effort to swing the state towards her candidacy. Her campaign had been outmaneuvered before the voting had even begun—in August of 2007. Balz and Johnson explain:

The decisions by Florida and Michigan to move their contests to January represented a serious challenge to the DNC’s authority. To Plouffe [Obama’s

campaign manager], Florida's move was a real obstacle to Obama's winning the nomination. . . . Plouffe liked the idea of South Carolina being the last contest before Super Tuesday. He believed Obama could win the state—narrowly—and that a victory there would provide Obama with modest momentum as the candidates turned towards February 5. . . . With the Obama campaign cheering them on, DNC officials moved to sanction Florida and then Michigan. . . . Plouffe also began pushing behind the scenes . . . to make sure the two states were treated equally and severely. . . . The party sanctions marked step one in a pair of events that locked in a calendar far less favorable to Clinton. The second step, initiated by politicians in the early states [namely Iowa], was to get all the candidates to agree not to campaign or advertise in either Florida or Michigan.

Thus, Obama's team had helped rig the front-loaded calendar to further his candidacy.⁵⁵

As was mentioned, the South Carolina primary boosted Obama's candidacy tremendously. He and his campaign had gone all out to court African-Americans who make up the majority of the Democratic electorate in the Palmetto State. Clinton's husband, Bill, also unwittingly helped her opponent. He challenged Obama's rhetorical framing of Clinton's voting record as supporting President Bush. Exasperated with what he believed were false accusations and Obama's inexperience, Bill said: "Give me a break. This whole thing is the biggest fairy tale I've ever seen." Obama's campaign leapt on the comment, suggesting that he was implying that Obama's candidacy was a "fairy tale." Things got worse when Hillary explained that while Dr. Martin Luther King, Jr.'s work had been important for civil rights, the Civil Rights Act would not have passed without President Lyndon Johnson. Representative Jim Clyburn of South Carolina—one of the most influential politicians in the state who happens to be African-American—publicly admonished the Clintons. Within 24 hours, the Clintons were being suspected of harboring racist thoughts. When Obama won 78 percent of the African-American vote, Clinton's campaign started losing support from members of the Congressional Black Caucus who were vital to her candidacy because they were convention superdelegates.⁵⁶

Whereas Super Tuesday winnowed the Republican field down to McCain, it did little to clarify the winner on the Democratic side of the aisle. Clinton handily won most of the large states (New York, New Jersey, Massachusetts and California), while Obama won more states overall. The popular vote was nearly evenly split as were the number of delegates. Obama's focus on caucuses had made the difference. Again, Balz and Johnson provide the background:

The February 5th calendar was a giant puzzle. . . . The Obama campaign concluded early on that investing in the caucus states could pay big dividends . . . they could be organized for relatively small amounts of money. . . . Democratic rules were deliberately complex. The party allocated delegates in each state based on both the vote statewide and by congressional districts. . . . Jeff Berman, a lawyer who oversaw Obama's delegate operations . . . in the summer of 2007 . . . assembled a group of seventy-five lawyers to research the rules governing primaries and caucuses in all of the states . . . the rules assured a virtual stalemate between two evenly balanced candidates.

In sum, Obama's team understood that if they played their cards right, they could turn the contest into a fight for delegates and a fight for super-delegates, which then meant a fight for perception. On February 5, they succeeded, and from then on, the two candidates alternated wins (she won Ohio, he won North Carolina, etc.) through June.⁵⁷

All of Obama's pledged delegate advantage came from his having won more votes in the states that held caucuses. By winning about 300,000 votes more than Clinton in caucus states, Obama won 143 pledged delegates more than Clinton (he garnered about 66.5 percent of the total available in those contests). Even though Clinton earned about 300,000 more votes than Obama had in the states with primaries, her victories earned her only about 20 more pledged delegates than him (or about 50.4 percent of the total available) because there were so many more ballots cast. In other words, his 300,000 vote margin in the caucuses meant a lot more than her 300,000 vote margin in the primaries because of the vast differences in turnout. Further, the delegate allocation by congressional districts, which tends to favor those areas that had supported past nominees in the general election (i.e., urban as opposed to rural) helped Obama maintain his delegate lead. In sum, his campaign's focused on urban, minority-majority districts and states that held caucuses advantaged him throughout the race and helped him stretch the calendar, so as to not fall victim to the front-loading. In fact, because of the dismissal of Michigan and Florida, the front-loading ended up sustaining Obama's momentum. Clinton persisted in fighting for the nomination through the last contest because she thought he might stumble.

More generally, the numbers reveal that Clinton won in the contests where 97 percent of the total votes were cast (the states with primaries), but Obama's victories in the contests where 3 percent of the total votes were cast (the states with caucuses) earned him the nomination.⁵⁸ As Howard Reiter explains, if the Democrats had used winner-take-all rather than proportional representation, "Clinton would have received 2,922 [delegate] votes, compared with 2,066 [delegate votes] for Obama."⁵⁹ Obama and his team made the tail wag the dog.⁶⁰ Still, Obama had been not only a top tier candidate, but also the "runner-up" to Clinton since shortly after his first fundraising report was released in April 2007. When Clinton stumbled in Iowa, he stepped up, and for the remainder of the contest, it was a battle of the frontrunners. One of them had to win and in that sense, it was less "volatile" than the Republican nomination race.

ANOTHER COURSE: THE 2012 ELECTION AND POSSIBLE REFORMS FOR THE FUTURE

Looking at the 2012 cycle, there was one striking difference from 2008. Even though for most of the year prior to the election President Obama's approval rating showed him earning the support of about 47 percent of voters and high unemployment numbers continued to signal a weak economy, the Republican aspirants made late entries into the race. A handful even decided to wait until the end of summer to declare their candidacies. In other words, for the first time since President George H. W. Bush's reelection effort in 1992, the opposition

field remained uncertain through much of the invisible primary period. Nevertheless, Mitt Romney, who chose to run again, raised the most money, drew the most support from Republicans in the national polls, and was tentatively named by the media, the frontrunner.

One similarity with 2008 was that in spite of the national parties' efforts to stretch the calendar and corral the states into a more orderly nomination process, chaos ensued. Since President Obama was not challenged for the nomination, the Democrats agreed to the calendar put forward by the Republicans. Together, they tried to push back the early contests (Iowa, New Hampshire, Nevada, and South Carolina) to February, and make March 6, 2012, the first "open date" for the other states, meaning that it would be the cycle's Super Tuesday. Florida decided that they deserved a more prominent date and sought permission to hold their primary on March 1. Michigan also threatened to hold their primary on February 28. It is too early in the cycle to know how this will be resolved, but should these states proceed, the early states would likely move from February to January 2012.⁶¹ With February then relatively open, it would not be altogether surprising if some of the other states staged a "mutiny" and moved from March to February. The one incentive the Republicans incorporated into their rules for the 2012 cycle (hoping that several states would opt to go later in the process) was that those states holding contests prior to April 1 must allocate national convention delegates using proportional representation rather than winner-take-all. As a result, it is possible that the Republican Party will split into two relatively equal factions (e.g., traditional, business-class Republicans versus the small government, Populist or "Tea Party" conservatives) and have a nomination race similar to Obama versus Clinton contest in 2008.⁶² Thus, the nomination process appears to again be headed for its own fiery crash, even though the lead car will likely pull through unscathed.

ENDNOTES

1. The author wishes to thank both James P. Pfiffner and Roger H. Davidson for the invitation to write this essay and for their many helpful suggestions to improve it.
2. Primaries are elections where voters cast ballots to choose party nominees for elective office. Different states hold different types of primaries, but most states hold what are known as "closed" primaries, where only registered partisans may vote in their party's primary. Caucuses are meetings of voters where candidates are collectively chosen as party nominees for elective office. Both are nomination contests, but typically, caucuses have far fewer voters turnout because they not only take more time, but they are scheduled at a specific time and as such, many voters find it difficult to participate. After 1972, states began using these types of contests to allocate pledged delegates (who were bound to support a specific candidate) to the parties' national conventions. Prior to 1972, many states held non-binding primaries or caucuses, where the delegates selected were able to switch their votes at the conventions. Before 1912, parties mostly staged local (or county) conventions to select delegates to a state convention who in turn would choose national convention delegates. Most of the local and state delegates were party leaders or elected officials, and few voters (or many partisans) had a role in selecting these delegates.
3. In 2008, thirty-three states held contests (most of them binding) by February 6, 2008 (National Association of Secretaries of State, Primary Calendar, January 15, 2008 update, see <http://nass>

- .org/index.php?option=com_content&task=view&id=120&Itemid=45). As recently as two cycles ago, the Iowa caucus was not scheduled to take place until January 24, 2000, and it would have taken until March 11 for thirty-three states held contests (see Table 12.1).
4. See Larry Bartels, *Presidential Primaries and the Dynamics of Public Choice* (Princeton, NJ: Princeton University Press, 1988). See also William G. Mayer and Andrew E. Busch, *The Front-Loading Problem in Presidential Nominations* (Washington, DC: Brookings Institution Press, 2004). See also William G. Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004). See also Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, eleventh edition (Lanham, MD: Rowman & Littlefield, 2004). See also Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004). See also Michael J. Goff, *The Money Primary: The New Politics of the Early Presidential Nomination Process* (Lanham, MD: Rowman & Littlefield, 2004). See also Marty Cohen, David Karol, Hans Noel, and John Zaller, "Beating Reform: The Resurgence of Parties in Presidential Nominations, 1980–2000," (Paper presented at the Annual Meeting of the American Political Science Association, 2002). See also Marty Cohen, David Karol, Hans Noel, and John Zaller, "Political Parties in Rough Weather," in *The Forum*, Vol. 5, Issue 4, Article 3 (2008), available at <http://www.bepress.com/forum/vol5/iss4/art3>. See also William G. Mayer, "Handicapping the 2008 Nomination Races: An Early Winter Prospectus," *The Forum*, Vol.5, Issue 4, Article 2 (2008), available at <http://www.bepress.com/forum/vol5/iss4/art2>.
 5. See Howard Reiter, "The Nominating Process," in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009), pp.70–86. He defined a race "in which the nominee had a meteoric rise, or (in the case of Goldwater) fluctuated over the year, as volatile and the others as stable," and found that, "from 1960 through 1980, exactly half of the six contests were volatile; from 1984 through 2008, five out of the nine—just about half—were volatile" (p.81).
 6. During the Constitutional Convention, several of the Framers believed that that the Electoral College would act as a nominating process for regional candidates and that the House of Representatives (or the Senate in the early drafts of the selection proposal) would make the final choice. George Mason stated, "Nineteen times out of twenty, the President would be chosen by the Senate" in Max Farrand, ed., *The Records of the Federal Convention*, volume II (New Haven, CT: Yale University Press, 1966), p.500, and for further discussion, pp.496–543. See also Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence, KS: University of Kansas Press, 1994).
 7. The presidential selection method was one of the most debated topics at the Constitutional Convention. Though several components of the Electoral College are the result of compromise (i.e., the number of electors awarded to each state; the House, voting by state delegation and making the final decision, rather than the Senate, etc), the Framers did not enter into these bargains without substantial debate about what they might mean for executive power and the federal government, more generally. Thus, while some have argued that the Electoral College may be thought of as an arrived at middle-ground solution, which satisfied most delegates, it is more appropriate to think of it as an institution invented to reflect the Framers' values about the nature and purpose of an executive in a separated powers scheme. See Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence, KS: University of Kansas Press, 1994). See also Max Farrand, ed., *The Records of the Federal Convention*, volume I and II (New Haven, CT: Yale University Press, 1966), especially volume II, pp.496–543. See also Gary Glenn, "The Electoral College and the Development of American Democracy," in *Perspectives on Political Science*, vol.32, no.1 (2003), pp.4–8.
 8. A number of provisions (voting separately for president and vice president; limiting the number of eligible candidates should the House decide; placing the vice presidential decision with the Senate; providing for death and disability; and limiting the number of terms of service) were modified or added to the Constitution by the Twelfth, Twentieth, and Twenty-Second Amendments. For a discussion of the flaws in the Framers' design, see Bruce Ackerman, *The*

Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy, (Cambridge, MA: The Belknap Press of Harvard University Press, 2005).

9. Not incidentally, Washington's precedent and the Framers' expectation have constrained the behavior of most presidential aspirants. Early seekers of the office went out of their way to feign indifference, while they simultaneously engaged in fierce politicking and partisan maneuvers. See Richard P. McCormick, *The Presidential Game: The Origins of American Presidential Politics* (New York, NY: Oxford University Press, 1982), pp.41–75.
10. According to Alexander Hamilton, “nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption” in Joanne Freeman, *Alexander Hamilton: Writings* (New York, NY: The Library of America, 2001), *Federalist* 68, p.364. Gouverneur Morris also noted at the Constitutional Convention on September 4, 1787, that the “principle advantage aimed at [by an electoral college] was that of taking away the opportunity for cabal” in Max Farrand, ed., *The Records of the Federal Convention*, volume II (New Haven, CT: Yale University Press, 1966), p.501.
11. “The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States,” so wrote Alexander Hamilton in Joanne Freeman, *Alexander Hamilton: Writings* (New York, NY: The Library of America, 2001), *Federalist* 68, p.364. Gary Glenn also explains that, “The Founders’ electoral college knowingly gave greater weight to presidential candidates who made broad appeals to all parts of the country and across the inevitable small state-large state, rural-urban, and agricultural-commercial conflicts of interest. They regarded choosing a president as more about reconciling interests, or at least not exacerbating the natural and inevitable conflicts of interest, than about simple arithmetic equality,” in “The Electoral College and the Development of American Democracy,” in *Perspectives on Political Science*, vol.32, no.1 (2003), p.6.
12. Richard P. McCormick, *The Presidential Game: The Origins of American Presidential Politics* (New York, NY: Oxford University Press, 1982). See also John H. Aldrich, *Why Parties?: The Origin and Transformation of Political Parties in America* (Chicago, IL: The University of Chicago Press, 1995); Lara M. Brown, *Jockeying for the American Presidency: The Political Opportunism of Aspirants* (Amherst, NY: Cambria Press, 2010).
13. John H. Aldrich, *Before the Convention: Strategies and Choices in Presidential Nomination Campaigns* (Chicago, IL: The University of Chicago Press, 1980), p.5.
14. Jefferson wrote about the upcoming presidential election in a number of letters in 1795–1796, including those addressed to James Madison, James Monroe, and Edward Rutledge. In the letters, he wrote that he was not interested in the presidency and he suggested to Madison that he make the run for the office. Eventually, in May of 1796, Jefferson was made the nominee by James Monroe and his fellow partisans. See Thomas Jefferson Randolph, *Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson* (Charlottesville, VA: F. Carr, and Co 1829), pp.337–353. See also Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York, NY: Vintage Books), p.194.
15. Though the Twelfth Amendment altered this provision, originally, each elector cast two ballots for president and the person with the most (so long as it was a majority) became president, while the second highest vote earner became the vice president.
16. In 1824, representatives from four states made up two-thirds of those attending the caucus. See Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), p.7.
17. See John H. Aldrich, *Before the Convention: Strategies and Choices in Presidential Nomination Campaigns* (Chicago, IL: The University of Chicago Press, 1980), p.7. See also Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), p.8.
18. The southern delegates had mostly been ignored because the Republicans had no chance of winning electoral votes in the South. The southern delegates’ votes (all 19½) put McKinley over

- the top at the convention. For further discussion, see Wayne H. Morgan, *William McKinley and His America*, revised edition, (Kent, OH: The Kent State University Press, 2003), p.146–147.
19. John H. Aldrich, *Before the Convention: Strategies and Choices in Presidential Nomination Campaigns* (Chicago, IL: The University of Chicago Press, 1980), p.8.
 20. In 1921, Franklin Roosevelt proposed in a letter that the Democratic National Committee employ a full-time staff at a national headquarters. He suggested that they hold national conferences (separate from the national conventions) where more activists could be involved with party issues and the development of a common ideology. In 1924, after the disastrous convention and election, he wrote another letter proposing “a permanent headquarters for the Party and a more democratic, participatory decision-making process for determining positions on issues and public policy . . . [he then copied it to] over 3,000 Democrats, including delegates at the recent convention,” according to Sean Savage, *Roosevelt: The Party Leader, 1932–1945*, (Louisville: University of Kentucky Press, 1991), p.6. Roosevelt continued these and other efforts (e.g., altering the number of delegates needed to win the nomination from two-thirds to a simply majority) throughout his presidency.
 21. On the final ballot, Humphrey earned over 1000 delegates more than Senator George McGovern and Senator Eugene McCarthy (both anti-war candidates) combined.
 22. The reform commission proposed “a rule requiring that all states represent these particular groups (African Americans, women, and youth) in reasonable relationship to their presence in the state population . . . [while the rule] was subsequently modified . . . beginning with its 1980 nominating convention, the party required that each state delegation be equally divided between the sexes,” according to Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), p.106.
 23. Larry Bartels, *Presidential Primaries and the Dynamics of Public Choice* (Princeton, NJ: Princeton University Press, 1988), p.20.
 24. It was thought that the early states held a disproportionate advantage over the later states, strict proportional representation had fostered too many factions, and the party leaders felt that they had too little sway in the process and that the rank-and-file partisans were not focused enough on the electability of the candidate. For further discussion, see Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), p.108.
 25. See Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), pp.12, 103–117.
 26. As of the 2012 cycle, “winner-take-all” delegate events only apply to states that hold their contests after April 1, 2012, see comparative table at <http://www.centerforpolitics.org/crystalball/articles/frc2011042802/> (accessed July 15, 2011).
 27. Andrew E. Busch and William G. Mayer, “The Front-Loading Problem,” and William G. Mayer, “The Basic Dynamics of the Contemporary Nomination Process: An Expanded View” in Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004).
 28. Journalist Arthur Hadley coined this phrase, which refers to the campaign period before the contests get underway. See Arthur T. Hadley, *The Invisible Primary* (Englewood Cliffs, NJ: Prentice Hall, 1976).
 29. See William G. Mayer and Andrew E. Busch, *The Front-Loading Problem in Presidential Nominations* (Washington, DC: Brookings Institution Press, 2004). See also Andrew E. Busch and William G. Mayer, “The Front-Loading Problem,” and William G. Mayer, “The Basic Dynamics of the Contemporary Nomination Process: An Expanded View” in Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004), pp.1–43; 83–132. See also Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, eleventh edition (Lanham, MD: Rowman & Littlefield, 2004), pp.89–115. See also Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004), pp.103–158. See also Michael J. Goff, *The Money Primary: The New Politics of the Early Presidential Nomination Process* (Lanham, MD: Rowman & Littlefield, 2004). See also Marty Cohen David Karol, Hans Noel, and John Zaller, “Beating Reform: The Resurgence of Parties in Presidential Nominations, 1980–2000,” (Paper presented at the Annual Meeting of the American Political Science Association, 2002).

30. Andrew E. Busch and William G. Mayer, "The Front-Loading Problem," and William G. Mayer, "The Basic Dynamics of the Contemporary Nomination Process: An Expanded View" in Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004), p.23.
31. Importantly, these "outsiders" and "dark horses" were top-tier candidates. Further, some polls even showed them as front-runners. For example, in December of 2003, John Kerry stood in the middle of the pack in most national polls, but he was leading in most of the statewide polls that were conducted in Iowa. As will be discussed shortly, his win there catapulted him into first place nationally, and he went on to win all but four states' contests (North Carolina, Oklahoma, South Carolina, and Vermont).
32. While participation and awareness of party nominating contests has increased since before the institution of the McGovern-Fraser reforms, average turnout is often less than 35 percent of the voting age population. Stephen J. Wayne, "When Democracy Works: The 2008 Presidential Nomination" in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009, pp. 48–69), p.49.
33. Several studies have traced the tangible benefits awarded to states that hold their contests early in the process. For an overview of the findings, see Andrew E. Busch and William G. Mayer, "The Front-Loading Problem," and William G. Mayer, "The Basic Dynamics of the Contemporary Nomination Process: An Expanded View" in Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004), pp.9–15.
34. While New Hampshire has been holding primary elections since 1920, it did not grow in its importance until the 1950s. New Hampshire allowed voters to express a presidential preference (no longer only selecting delegates to the national convention) in 1952, and with that, General Dwight D. Eisenhower beat Senator Robert Taft, the party's front-runner for the nomination. The Iowa caucus, set up in 1972, came to national attention because it was another way for a state to abide by the Democratic Party reforms without holding a primary election (often more expensive).
35. Super Tuesday was the name given to the date (traditionally in March) when several southern states would hold their primary elections. As Nelson Polsby and Aaron Wildavsky explain: "The idea behind the creation of Super Tuesday primaries are twofold: (1) to give the South a larger voice in presidential nominating politics, and (2) by switching from caucuses to primaries, and by holding primaries relatively early in the campaign (that is, before it was all decided), they hoped some more moderate or conservative Democratic politicians would be in the race, thereby attracting voters into the primaries." See Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, eleventh edition (Lanham, MD: Rowman & Littlefield, 2004), p.109.

This phrase, however, has now come to be applied to any early date with a large number of states holding contests. In 2008, there were so many states holding contests on February 5, some pundits renamed it "Tsunami Tuesday."

36. Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections: Strategies and Structures of American Politics*, eleventh edition (Lanham, MD: Rowman & Littlefield, 2004), pp.21–32.
37. Howard Reiter, "The Nominating Process," in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009, pp.70–86), p.73.
38. See William G. Mayer, ed., *The Making of the Presidential Candidates 2004* (Landham, MD: Rowman & Littlefield, 2004). See also Stephen J. Wayne, *The Road to the White House 2004: The Politics of Presidential Elections* (Belmont, CA: Wadsworth/Thomson Learning, 2004).
39. Stephen J. Wayne, "When Democracy Works: The 2008 Presidential Nomination" in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009, pp. 48–69), p.68.
40. Numbers taken from *The New York Times* "Election Guide" website at <http://politics.nytimes.com/election-guide/2008/calendars/republicanprimaries/index.html>, accessed on October 14, 2007.
41. See Associated Press story on August 20, 2006: <http://www.foxnews.com/story/0,2933,209443,00.html>, accessed on July 15, 2011.
42. For a review of the final Democratic decision, see CNN's Rebecca Sinderbrand, "Full voting rights restored to Florida and Michigan" on August 24, 2008: <http://politicalticker.blogs.cnn.com/2008/08/24/florida-michigan-voting-rights/>.

- cnn.com/2008/08/24/full-voting-rights-restored-to-florida-and-michigan/, accessed July 15, 2011. For a review of the Republican decision, which allowed all of the delegates from Florida and Michigan to attend the RNC Convention, but only allowed half of them to cast votes, see Associated Press article: http://rawstory.com/news/2008/Mich._Fla._could_get_full_voting_0816.html, accessed on July 15, 2011.
43. Lara M. Brown, *Jockeying for the American Presidency: The Political Opportunism of Aspirants* (Amherst, NY: Cambria Press, 2010).
 44. Dan Balz and Haynes Johnson, *The Battle for America 2008: The Story of an Extraordinary Election* (New York: Viking Press, 2009), pp. 235, 251–2.
 45. *Ibid.*, pp. 278, 261.
 46. David Luo, “Romney’s 3-Legged Stool Takes the Stage” in *New York Times*, July 27, 2007.
 47. Dan Balz and Haynes Johnson, *The Battle for America 2008: The Story of an Extraordinary Election* (New York: Viking Press, 2009), p.268.
 48. *Ibid.*, pp. 241–2, 244, 247.
 49. For instance, a Rasmussen poll of likely voters from August 8 showed Romney earning 32 percent, Giuliani earning 20 percent and McCain tied for third with former Senator Fred Thompson, earning just 11 percent. Four months later, another Rasmussen poll of likely voters from December 18 showed Romney earning 31 percent and McCain in second place, earning 27 percent. For a further review of the polling throughout the period, see http://www.realclearpolitics.com/epolls/2008/president/nh/new_hampshire_republican_primary-193.html (accessed on August 10, 2009). Dan Balz and Haynes Johnson, *The Battle for America 2008: The Story of an Extraordinary Election* (New York: Viking Press, 2009), p.280.
 50. Dan Balz and Juliet Eilperin, “The G.O.P. Race is Close in S. C.: Huckabee and McCain Lead; Winner Will Receive Critical Boost” in *Washington Post*, January 19, 2008.
 51. These case studies of the 2008 Democratic and Republican nominations are adapted from chapter 7 in Lara M. Brown, *Jockeying for the American Presidency: The Political Opportunism of Aspirants* (Amherst, NY: Cambria Press, 2010).
 52. ABC News, “Bush Suffers from Record-Low Job Approval.” Pollsters regularly ask: “If the election were held today, which party’s candidate would you vote for in your congressional district—the Democratic candidate or the Republican candidate?” See Langer, “Democrats Hold Slightly Narrowed Lead.” Dan Balz and Hayes Johnson, *Battle For America 2008: The Story of an Extraordinary Election* (New York: Viking, 2009), 58–74.
 53. See discussion in Howard L. Reiter, “The Nominating Process,” in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009), p.72.
 54. Dan Balz and Haynes Johnson, *The Battle for America 2008: The Story of an Extraordinary Election* (New York: Viking Press, 2009), p. 138. For exit polls see <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/index.html#NHDEM> (accessed on August 11, 2009).
 55. *Ibid.*, pp. 181–2.
 56. Sean Wilentz, “Race Man: How Barack Obama Played the Race Card and Blamed Hillary Clinton” in the *New Republic*, February 27, 2008.
 57. Dan Balz and Haynes Johnson, *The Battle for America 2008: The Story of an Extraordinary Election* (New York: Viking Press, 2009), pp.182–5.
 58. Lara M. Brown, *Jockeying for the American Presidency* (Amherst, NY: Cambria Press, 2010), p. 315.
 59. Howard L. Reiter, “The Nominating Process,” in *Winning the Presidency 2008*, edited by William J. Crotty (Boulder, CO: Paradigm Publishers, 2009), p.76.
 60. After the campaign, David Plouffe, Obama’s campaign manager discussed the importance of the Florida decision and explained that had the state’s results counted, Obama may have lost. See <http://thecaucus.blogs.nytimes.com/2008/12/11/from-obama-camp-a-what-if/?scp=2&sq=%22david%20plouffe%22&st=cse> (accessed on December 15, 2008).
 61. Jim O’Sullivan, “Gardner Hints New Hampshire Primary Will Move to January,” available at <http://hotlineoncall.nationaljournal.com/archives/2011/07/nh-elections-ch.php>, accessed July 17, 2011.
 62. Rhodes Cook, “2012 Presidential Nomination Process: It’s Time for the States,” available at <http://www.centerforpolitics.org/crystalball/articles/frc2011042802/>, accessed on July 17, 2011.

Reading 13

The Changing Dynamics of Presidential Fundraising: From 2008 to an Early Look at the 2012 Election

GREGORY FORTELNY, PETER L. FRANCIA, AND CLYDE WILCOX

On May 16, 2011, former Massachusetts governor and 2008 presidential candidate Mitt Romney walked the aisles of a Las Vegas Convention Center ballroom. Nearly 800 volunteers traveled across the country to support the candidate, bringing along their personal phonebooks to participate in an old-fashioned telephone fundraiser. Amid the noise of their phone calls, Romney found time to thank some of his volunteers personally and even to make an occasional call himself. Eight hours later, he strolled away with over \$10 million and enough time to stop at a fast-food restaurant, In-N-Out Burger, grabbing burgers for the group of College Republicans waiting for him at UNLV.¹

Despite the impressive showing that day, early fundraising for the complete field of Republican presidential candidates for 2012 was slow to start in comparison to the amounts that Democrats raised four years earlier. Barack Obama, the top fundraiser among presidential candidates in 2008, saw his campaign take in nearly \$59 million in the first six months of 2007 and closed out the nomination period with \$409 million.² He became the first candidate to decline federal funds for the general election, allowing him to raise and spend unlimited amounts, and ending his campaign with more than \$745 million in receipts.³ Although Obama's current fundraising totals have not been as high as they were four years ago, analysts speculated we might bear witness to the first billion-dollar campaign in 2012.⁴

Part of the explanation for Obama's fundraising success in 2008 was the internet and the small contributions that flow so easily through it. In January of 2008 alone, Obama raised \$35 million, with more than 90% of his donors that month giving \$100 or less, and more than 40% giving \$25 or less.⁵ Just a few days later, the Obama campaign announced that it had raised more than \$7.5 million in just 36 hours on the Internet.⁶ By the time the general election began, small contributions of \$200 or less filled more than half of his war chest.⁷

Although Obama was not alone in raising small Internet contributions, none have matched his success from 2008, at least not consistently. Ron Paul, a mere footnote in the 2008 polls, raised \$4 million over the Internet on a single day in November 2007.⁸ In 2011, after promoting his Presidents' Day money bomb through his Facebook page, Paul again brought in an impressive \$700,000 in 24 hours.⁹ Paul also raised millions through his political action

committee (PAC), Liberty PAC, and his nonprofit organization, Campaign for Liberty.¹⁰

In addition to the candidates and their affiliated organizations, independent outside groups are positioned to play a major role in the 2012 election following several court rulings that have made it easier for them to raise and spend money. In 2011, a pro-Romney “super” PAC (a group that can raise unlimited sums of money, but only makes independent expenditures and does not make campaign contributions), created by several of his former aides, received a \$1 million contribution from a months-old firm.¹¹ Weeks later the firm dissolved, making the source of the funds difficult to identify.

The success of Obama’s 2008 fundraising approach and the expanded role that independent groups are likely to play in 2012 have profound implications for presidential campaigns. To understand what happened in the 2008 campaign and what it portends for current and future campaigns, it is first useful to understand the basic rules that regulate fundraising, and past practices to raise money within these rules.

THE RULES OF THE PRESIDENTIAL FINANCE SYSTEM

Money has long been an important and controversial element in American presidential elections. In 1896, the Ohio industrialist Mark Hanna gave \$100,000 to Republican nominee William McKinley—the equivalent of more than \$2.5 million today—and additionally raised between \$3.5 and \$10 million by assessing banks and corporations a fee based on their assets.¹² Standard Oil and J. P. Morgan each gave \$250,000, with other corporations, banks, and industrialists also giving large sums to the McKinley campaign.¹³ While Democratic nominee William Jennings Bryan mobilized farmers, workers, and evangelical Christians, the Republican Party tapped the deep pockets of corporate America, outspending the Democrats by perhaps as much as ten to one.¹⁴

The abuses of the McKinley campaign led Congress to ban direct contributions by banks and corporations in national elections. Later, Congress also banned direct gifts from labor unions. These bans, however, were routinely evaded.¹⁵ In 1972, President Richard Nixon’s Committee to Reelect the President (CREEP) took a page from Hanna’s playbook and asked for direct corporate contributions, hinting that companies that did not comply might be denied access to administration policy-making circles. Illegal corporate contributions to CREEP were laundered through the Grand Cayman Islands and smuggled into the United States. Eventually the head of corporate fundraising for the Nixon campaign went to jail. Other large donors were made ambassadors despite their apparent lack of qualifications for the job. These abuses led Congress to pass comprehensive campaign finance reform.

THE FEDERAL ELECTION CAMPAIGN ACT

In 1974, Congress amended the Federal Election Campaign Act (first passed in 1971). The 1974 amendments provided a regulatory framework for congressional and presidential elections. The presidential campaign system had four main elements:

1. *Public funding.* The 1974 amendments completed the presidential public finance system that began with the Revenue Act of 1971, which established federal financing of presidential elections. Under the system, presidential candidates can accept partial government funding of their campaigns during the primary election phase and full public funding for their general election campaigns. To receive public funds, a candidate must: (1) seek the nomination of a political party to the office of president; (2) raise more than \$5,000 in each of at least 20 states; and (3) agree to spending limits (described below). Taxpayers finance the system by checking the “Yes” box to a question on their 1040 federal income tax return that asks if they want some of their federal tax to go the Presidential Campaign Fund. Under the original legislation, the question asked if taxpayers wanted to direct \$1 to the Presidential Election Campaign Fund, but to meet the escalating costs of presidential campaigns, Congress increased this to \$3 in 1993. Checking the “Yes” box does not increase one’s tax burden, yet public participation in the program has been relatively modest and has been in decline in recent years. In 2007, just 8.3 percent of tax returns processed designated money to the Presidential Election Campaign Fund—a sharp drop from a high of 28.7 percent in 1980.¹⁶

The Presidential Election Campaign Fund operates by providing candidates with a subsidy matching the first \$250 of any contribution from an individual during the primary election cycle (e.g., a contribution of \$1,000 is worth \$1,250, while a gift of \$25 is worth \$50 because of the federal match). There is a maximum limit to how much any candidate can receive in matching funds. In 2008, that limit was \$21.025 million (or half of the system’s “base” spending limit of \$42,050,000).¹⁷ Candidates can receive these matching funds even if they run unopposed in their party’s primaries, as Ronald Reagan did in 1984 and Bill Clinton did in 1996.

Candidates can borrow from banks against the promise of matching funds, making that money available early in the campaign. The public fund also finances the Republican and Democratic party conventions (more than \$16.8 million each in 2008).¹⁸ Finally, the public fund finances the general election campaigns of the two major parties by providing equal-sized grants. The 2008 Republican nominee John McCain, for example, received the maximum \$84.1 million (Obama declined the public grant).¹⁹

Minor-party candidates who receive at least 5 percent of the popular vote can receive a portion of the overall grant in the next election as well. Reform Party candidate, Ross Perot, who won 19 percent of the popular

vote in the 1992 general election, received approximately \$29 million for the 1996 election.²⁰ The most recent minor-party candidate to receive public funds was in 2000 when Reform Party candidate, Pat Buchanan, received \$12.6 million.²¹ (The Reform Party later became ineligible for public funds after 2000 following Buchanan's poor showing in the general election in which he earned just 0.4 percent of the popular vote.)

2. *Contribution limits.* Under the 1974 amendments to FECA, individuals were limited to contributions of \$1,000 to any one candidate during the primary election phase and were not permitted to give to the presidential candidates during the general elections if the candidate accepted the public grant. (Individual contribution limits were later increased following passage of the Bipartisan Campaign Reform Act in 2002; described below.) Interest groups could form political action committees (PACs), which could raise money up to \$5,000 from each of their members and give up to \$5,000 per candidate in the primary elections. Parties could give money to candidates in the primary elections and spend on behalf of the candidates in the general election. Candidates could give their own campaign \$50,000 of their personal wealth, but later Court rulings allowed candidates who did not accept matching funds to spend unlimited amounts from their family's fortunes.
3. *Spending limits.* During the primary election phase, candidates who accept public funds must agree to an overall spending limit, which is indexed for inflation. In 2011, the limit was set at approximately \$44.22 million per candidate.²² There are also spending limits for each individual state that vary according to the state's population, although not its importance in the electoral calendar. This means that critical states such as Iowa and New Hampshire, which hold early caucuses and primaries, but have relatively few citizens, have low spending limits.

However, nearly all candidates have evaded these early state limits with a wide variety of creative bookkeeping arrangements, such as having campaign workers sleep and buy supplies in Nebraska, while campaigning in Iowa. Additionally, there are limits on the amounts that individuals and groups may spend to help promote particular candidates or parties. Candidates who accept federal funds in the general election agree to forgo additional fundraising and spending by their campaign committees, although the national party committees can raise money and spend it to help their campaigns.

4. *Disclosure.* The 1974 amendments to FECA created a new federal agency, the Federal Election Commission (FEC), to audit presidential campaigns, disburse the federal fund, and maintain records of the fundraising and spending of candidates, parties, and PACs. Candidates, parties, and PACs must file regular reports detailing the names, occupations, and addresses of their contributors and the way they have spent their money. The FEC makes this information available in a variety of formats, including through its Web page, to help inform the public about which particular industry or organized interests support a given candidate.

FECA UNRAVELS

Although the FECA amendments provided a comprehensive framework for financing presidential campaigns, they were never fully implemented. Almost immediately an unusual coalition of liberal and conservative activists challenged the new FECA regime in court, and in the 1976 *Buckley v. Valeo* decision, the Supreme Court made important changes to the law. The Court sought to balance the importance of campaign spending as a form of free speech with the need to control corruption. The Court upheld contribution limits, but ruled that there could be no limits on the amount that individuals, groups, or candidates could spend. Any candidate who accepted federal matching funds, however, could be bound by FECA's aggregate and statewide spending limits. The Court reasoned that limiting contributions was necessary to help prevent corruption or the appearance of corruption, but that limits on spending were an unconstitutional abridgement of free speech.

This ruling meant that groups and individuals were limited in the amounts they could give to a candidate; however, they could spend unlimited amounts independently to advocate the election or defeat of that candidate. A company or labor union could thereby form a PAC and give \$5,000 directly to a candidate during the primary election. The same PAC, however, could also spend, hypothetically, \$10,000,000 in advertising urging voters to support either (or both) of the candidates. Such spending cannot be coordinated with the individual candidate and must be kept strictly independent of the campaign.

In 1996, the Court made possible an additional type of spending when it ruled that outside groups could spend unlimited amounts to advocate issues—even mentioning candidates by name and showing their pictures, so long as they did not use specific phrases such as “vote for” or “reelect.” Individuals and political parties can also engage in issue advocacy campaigns that do not require disclosure to the FEC, but they must not be coordinated with the candidate's campaign.

Although court decisions have greatly changed the FECA regulatory regime, legislation passed by Congress in 1979 opened up the greatest loophole in presidential fundraising. Congress allowed individuals and interest groups to make contributions of unlimited size to political parties. This “soft money” was permissible for in party-building activities such as infrastructure, hiring staff, and mobilizing voters and in nonfederal elections for state and local offices. Almost immediately, parties discovered that presidential candidates are the best soft-money fundraisers. The two major parties combined raised more than \$262 million in soft money in 1996 and \$495 million in 2000.²³

By 2001, it was clear that the FECA framework was eroding. Contribution limits were evaded by soft money, which allowed individuals, corporations, and unions to give unlimited sums. Spending limits were voided by the courts, except for candidates who accept matching funds. The matching fund system was in place, but George W. Bush proved in 2000 that some candidates could decline matching funds and raise more than the spending limits that come with these funds. Finally, disclosure was becoming problematic as issue advocacy spending, and the contributions that financed them, were not transparent.

THE BIPARTISAN CAMPAIGN REFORM ACT

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), seeking to deal with some of the problems that had developed in the FECA framework. The law sought to eliminate soft money, regulate issue advocacy, and improve disclosure. The act did not primarily focus on presidential campaigns, but its provisions did affect fundraising by presidential candidates.

The new law initially doubled the contribution limits from \$1,000 to \$2,000 from any individual donor per election (or \$4,000 for the primary and general election combined). This limit is indexed for inflation and increased to \$2,500 per election for the 2011–12 cycle. The law, however, did not increase the portion of individual contributions matched by the federal government in presidential elections. As noted earlier, under the original FECA provisions of 1974, the government matched the first \$250 of contributions that were capped at \$1,000; now it matches the first \$250 of contributions capped at \$2,500.

The presidential public finance system also has failed to keep pace with the escalating costs of presidential campaigns, and BCRA did not address this problem. Because candidates who take matching funds are bound by spending limits for individual states, especially the Iowa caucuses and the New Hampshire primary, and to an overall spending limit that applies to the entire primary election process, more and more serious candidates have opted against participating in the program, especially with the higher contribution limit. Additionally, candidates who accept matching funds can invest no more than \$50,000 of their own money into their campaign, providing another reason—at least for independently wealthy candidates—to decline public funds.

Steve Forbes, a Republican, was the first serious candidate not to seek matching funds in 1996, spending \$42.6 million, mostly of his own money, in a year when the spending ceiling was \$37.3 million.²⁴ George W. Bush followed Forbes' lead in 2000 by rejecting public funding and raising some \$96 million in a year when the cap was less than half that amount.²⁵ Bush became the first candidate to win the presidential nomination of a major political party after refusing public funds during the primaries and caucuses. He rejected matching funds again in 2004, as did two of the Democrats' leading contenders, Howard Dean and John Kerry.

Dean and Kerry recognized that Bush had no challenger for the Republican nomination in 2004. This gave Bush a potentially significant strategic advantage. If Dean or Kerry accepted federal matching funds, they would be bound by spending limits set by federal law that would be much less than Bush would be able to spend. Moreover, if the Democratic nomination was competitive, then the eventual winner might well have spent the entire amount allowed by the law in his efforts to win the primary, and be barred from further spending until the late summer when the Democratic national convention freed up funding for the general election campaign. In that scenario, Bush could air unanswered broadcast ads for months, building an insurmountable lead. This calculus undoubtedly influenced Dean's and Kerry's decision to decline matching funds.

Kerry went on to become the first Democrat to win the party's presidential nomination without accepting public funds during the primaries and caucuses. Perhaps, not surprisingly in light of the strategic considerations explained above and the fact that voters failed to punish Bush or Kerry for their financing decisions, many of the leading candidates in both parties in 2008 refused public matching funds, including Democrats Barack Obama and Hillary Clinton, and Republicans Rudolph Giuliani, Mitt Romney, and John McCain.

BCRA also banned soft-money contributions to political parties. In 1996, Republican Bob Dole's campaign relied heavily on party soft-money spending to keep his campaign afloat after the primaries ended and before he received the general election public grant. Dole had spent his legal limit winning his party's nomination, while President Clinton had been able to use his primary election funds for general election purposes because Clinton faced no opposition in the Democratic primaries. In 2004, Bush enjoyed the same advantage Clinton had in 2000. The Democratic challenger, John Kerry, did not accept matching funds during the nomination phase of the election and was able to raise enough money to compete with Bush on a relatively level playing field.

In 2008, John McCain and Barack Obama both rejected matching funds during the nomination phase of the election. During this phase, McCain raised \$204 million while Obama took in \$409 million—amounts that exceeded those raised by both Bush and Kerry during the same period four years earlier.²⁶ Unlike McCain, however, Obama became the first major-party nominee since 1976 to reject public funds in the general election as well. McCain's acceptance of the general election grant limited him to \$84.1 million. Meanwhile, Obama was able to raise \$337 million during the general election, outspending McCain by large margins in key battleground states during the final months of the campaign.²⁷

Recent court rulings have also affected BCRA. In 2007, the Court ruled in *Wisconsin Right to Life v. FEC* that BCRA's provision banning issue ads in the month preceding the primary and the two months preceding the general elections was unconstitutional violation of free speech. In issuing the majority decision, Chief Justice John Roberts offered an ominous tone for future reforms, declaring, "Enough is enough."²⁸ The Court followed up that ruling with an even more far-reaching decision a few years later. In *Citizens United v. FEC* (2010), a divided Court ruled by a 5 to 4 margin that prohibition on corporations and labor unions from using their general treasury funds to finance independent expenditures was unconstitutional. With more money available to corporations and labor to use for independent expenditures following *Citizens United*, independent expenditure totals increased to \$210.9 million in 2010 from \$156.8 million in 2008 and \$37.4 million in the previous midterm election of 2006, with one report indicating that 67 percent of independent expenditures in 2010 coming from "groups freed by *Citizens United*."²⁹

Shortly after the *Citizens United* ruling, yet another significant court decision strengthened the role of independent outside groups. In *SpeechNow.org v. FEC* (2010), the D. C. Circuit of Appeals ruled that federal PACs that did not contribute to any candidates or political parties, but made independent expenditures only

could raise unlimited sums of money. The ruling resulted in a new group of “independent expenditure committees” or what are more commonly referred to as “super PACs.” One super PAC, American Crossroads, headed by former George W. Bush advisor, Karl Rove, reported that it raised \$3.8 million during the first six months of 2011 and that it aimed to spend upwards of \$120 million in the 2012 election cycle to wage a massive attack ad campaign to defeat President Obama and to help Republican congressional candidates.³⁰ Progressive- and Democratic-leaning interests, likewise, have vowed to organize their own “soft money Death Star” to defend President Obama.³¹ Some political observers have speculated that President Obama and various sympathetic super PACs could raise and spend as much as \$2 billion³² combined in the 2012 election—a prediction that illustrates how the regulatory regime, which was supposed to have been expanded under BCRA, has effectively crumbled.

THE MONEY CHASE: FUNDRAISING IN 2008

Over the past several election cycles, fundraising and spending by presidential candidates soared. In the 2008 election, presidential candidates raised more than \$1.1 billion combined from individual contributors—nearly twice the total raised during the 2004 election cycle.³³ Barack Obama alone raised more than \$600 million from individuals, and even candidates with no real chance at the nomination raised several million dollars in individual contributions.³⁴ The contributors who finance elections have different motives for giving, and campaigns have developed different methods to connect their solicitation of a contribution with the motives of the donor. Some donors are ideologues, who care deeply about issues like abortion, health care, the war in Afghanistan, or small government.³⁵ Others are investors, who give to candidates in order to gain access to help pursue policies that will further their business interests.³⁶ Still others are intimates, who enjoy the social contacts that come with big fundraising events.³⁷

Candidates differ in their ability to appeal to these different pools of donors. Moderates have a difficult time appealing to ideologues, and candidates who are not public officials typically have a difficult time attracting money from investors. Minor-party candidates have a difficult time as well. The three most prominent minor-party candidates in 2008—independent Ralph Nader, Green Party candidate Cynthia McKinney, and Libertarian Bob Barr—all raised minimal sums of money. Nader brought in only \$3 million from individual contributors, Barr just \$1.4 million, and McKinney less than \$200,000.³⁸

Most serious campaigns solicit large contributions from investors and intimates by building networks of personal solicitation. Hillary Clinton’s top fundraisers in 2008, for example, each asked hundreds of others to give to Clinton, and after they gave, again asked them to help raise even more. Put simply, large fundraising networks resemble pyramids, in which each fundraiser has other fundraisers who are seeking to help them raise money for the candidate. Clinton’s top fundraisers pledged to raise \$1 million apiece, and some then sought out others who would pledge to help raise \$100,000.³⁹

Top solicitors frequently are recognized with titles: George W. Bush called his top solicitors “Pioneers” in 2000; John Kerry called his top fundraisers “Chairs” in 2004; and in 2008, John McCain had his “Trailblazers” while Hillary Clinton had her “Hill Raisers.”⁴⁰ Often these solicitation networks are based on personal relationships more than ideology. Donors may give to a candidate not because they support him or her, but because they do not want to refuse the person who asked them. Clinton, Romney, and other leading candidates in 2007 spent a good deal of time at large fundraising events where all in attendance paid large sums. In 2004, Bush raised \$3.5 million at a single event on June 17, 2003, charging \$2,000 a plate for a dinner of hot dogs, hamburgers, and nachos.⁴¹

In addition, candidates raise money by contacting potential contributors impersonally—usually through the mail, often by telephone, and more recently, through the Internet. In past elections, candidates found lists of ideologically motivated donors by “renting” the mailing lists of sympathetic organizations such as the NRA or the Sierra Club, and “prospecting” the list by mailing solicitations to people on the list. Those who respond are added to the candidate’s “house list” and asked to give again, but those who do not respond to the first mailing may not be contacted again.

In earlier elections, direct-mail fundraising often raised substantial sums on money for ideologically extreme candidates. In 1988, televangelist Pat Robertson raised more money than the sitting vice president, George H. W. Bush, in the first months of the campaign, primarily in small contributions raised through the mail.⁴² Robertson’s donors gave repeatedly, and his campaign responded with another letter asking for more.⁴³

Strongly ideological candidates primarily use direct mail by making strong emotional appeals, which can make Americans of modest means consider contributing to a candidate. Fundraising letters typically use extreme language, and are aimed at individuals who are known to give in response to such letters. Direct mail fundraising costs money for each letter sent, and mailings to moderates have typically lost money.⁴⁴

The Internet has allowed candidates to develop new techniques for impersonal solicitations of small contributions. John McCain used the Internet successfully in 2000, but it was Howard Dean in 2004 who first understood the potential of the medium. Dean raised \$20 million over the Internet during his run for President in 2004.⁴⁵ He developed e-mail solicitation lists and invested in large and interesting Web sites, on which people could browse the site and eventually give without being solicited. He also attracted donors and volunteers through “meet up” sessions where they could interact in a virtual space that added great excitement to younger, technologically savvy citizens.

Dean showed that the Internet could deliver more complex ideological information, because Web sites can convey a far deeper and more nuanced position than a five-page letter. His campaign showed that the Internet could also provide social benefits by allowing activists to meet each other online, and then later arrange for meetings to do work for the campaign. In 2008, Barack Obama took Internet fundraising and organizing to an entirely new level.

FUNDRAISING IN 2008

In the 2008 campaign, most of the leading candidates were expected to forgo matching funds and to rely instead on networks of large donors, supplemented with narrowly targeted direct mail. This approach had raised record amounts for George Bush and John Kerry. At the start of the campaign, conventional wisdom suggested that Clinton and Romney had the fundraising advantage. Clinton could tap into a well-established network of Democratic fundraisers who had worked for her husband and her Senate campaign, as well as fundraising experts for women's organizations. She asked fundraisers to commit to her early, so that her rivals would have fewer options, and told the fundraising team to ask donors to give only to her and not to any other Democratic candidate. Clinton sought to build an aura of inevitability to her campaign, so that potential donors might not bother to give to a rival who had no chance of winning. She expected her most serious rival to be John Edwards, who had run as vice president in 2004 and had access to solicitors and donor lists from that campaign.

Romney had an estimated net worth of roughly \$200 million at his disposal, and a network of fundraisers who were impressed by his business background and record as governor in Massachusetts.⁴⁶ But Romney faced serious rivals capable of raising significant sums of money—including Senator John McCain, who had run for the Republican nomination in 2000, Rudolph Giuliani, former mayor of New York City and early frontrunner, and former Senator Fred Thompson, whose television star status had many Republicans hoping at the time that he might be the next Ronald Reagan.

On the Democratic side, Clinton led after the first two quarters of 2007 with \$63.1 million, but to her surprise, Barack Obama raised nearly as much.⁴⁷ In fact, Clinton's advantage came because she was able to transfer unused money from her Senate Campaign Committee. By the end of the third quarter of 2007, Obama was ahead in fundraising. More importantly, Clinton had spent lavishly early in the campaign, and had less money in hand to spend as the campaign accelerated. Indeed, throughout the early primaries and caucuses, Obama had more cash on hand and less debt and was able to outspend Clinton and, more importantly, to spend large sums as polling data showed shifting sentiments. Clinton raised more money in 2007–2008 than any candidate in past elections, and considerably more than any Democratic candidate had ever done, but Obama raised more than twice her total in individual contributions.⁴⁸

Obama's fundraising success depended heavily on creative use of the Internet. Obama maximized these strengths by reaching out to the "tech class" of Silicon Valley—something that the Clinton campaign did not do with the same level of enthusiasm and intensity as the Obama campaign.⁴⁹ Obama's Silicon Valley supporters provided not only their own money in the form of campaign contributions, but more importantly, the knowledge of how to make the most efficient use of the latest communications technology.⁵⁰ The Web site, My.BarackObama.com, provided an array of social networking tools to allow visitors to participate in the campaign, including directions on how to register, and then various ways to volunteer and to contact others.

It also contained information about Obama's biography; it allowed users to download an Obama news widget; and it offered text-message updates and ring tones with Obama offering his signature campaign line, "Yes we can."

Obama's fundraising included repeated e-mail solicitations, asking for small amounts. But the campaign also encouraged small donors to become solicitors. Supporters who visited the Obama Website could create their own fundraising Website with their own fundraising goals. The site showed a thermometer that became warmer as the solicitor moved toward the goal.⁵¹ Many of those who were asked to give this way themselves created fundraising Web pages. They went on to create links through Facebook, and many created personal videos that they displayed there or in some cases, posted to YouTube.

While Clinton spent time in smaller fundraising events where all in attendance had given a large sum, Obama often appeared at stadium rallies with thousands of people who were not charged any money, Obama not only asked for votes, but also that those in attendance make a small contribution. Those who sent a specific text message to the Obama campaign were then contacted with a request to contribute.⁵² Those who gave were later asked to raise money for the campaign. Many were contacted repeatedly by e-mail, and some of these messages included video attachments that provided much more excitement than any direct mail letter.

In comparison to the neat pyramidal networks of large donor fundraising, the Obama network grew virally, with individual donors contacting their Facebook friends or texting everyone in their cell phone list. Anyone who ended up on the Obama list was asked not just to give, but also to work for the campaign. During the final days, the campaign asked its small donors to contact specific neighbors, or to download a program that would automatically text message anyone on their cell phone list who lived in a closely contested state.⁵³ Late in the campaign, the Clinton team discovered Internet fundraising and used it effectively; however, it ultimately ended up running a very good 2004 fundraising campaign in a year when a candidate rewrote the playbook.

On the Republican side, Giuliani led early fundraising, in part because Romney did not contribute from his own funds until later. McCain's early fundraising faltered in 2007, and his end-of-the-year report in 2007 to the Federal Election Commission actually showed his campaign in the red, with \$3 million on hand and \$4.5 million in debts. The surprising leader in fourth quarter receipts was long-shot candidate Representative Ron Paul of Texas, who raised a stunning \$19.8 million, largely through Internet donations that came about from motivational YouTube videos and social networking techniques similar to those of the Obama campaign.⁵⁴ The Paul campaign failed to win a Republican caucus or primary and never posed a serious challenge for the Republican nomination; however, it did prove that the techniques that worked for Obama can work for at least certain types of Republican candidates.

In the early months of the 2007–08 campaign, Romney loaned his own campaign \$45 million from his personal wealth—the highest sum on record. Romney outspent his rivals in Iowa and New Hampshire by large sums, including a record \$7 million on TV ads in Iowa alone, only to lose to former governor and Baptist minister Mike Huckabee who spent significantly less.⁵⁵

Huckabee used a network of evangelical churches in the 2008 caucuses first created by televangelist and 1988 presidential candidate Pat Robertson. A few days later, John McCain won the New Hampshire primary despite being outspent by a wide margin by Romney. The Republican race demonstrated clearly that money alone does not determine election outcomes.

After his victory in New Hampshire, McCain went on to win in South Carolina and Florida, and his successes bolstered his fundraising. He clinched the nomination early and continued to raise money throughout the campaign, eventually raising some \$200 million.⁵⁶ Yet McCain's primary election fundraising was nearly doubled by Barack Obama during the same period.⁵⁷

THE 2008 GENERAL ELECTION: OBAMA'S \$84 MILLION GAMBLE

After some hesitation, Barack Obama became the first major-party nominee to decline public funding in the general election in 2008. Obama had earlier promised to accept the \$84.1 million public subsidy that McCain had agreed to accept. Obama gambled that he could raise more than this amount during the general election by returning to donors who had given during the primaries. Under campaign finance rules, even those primary election donors who had given the maximum (\$2,300 in 2008) during the nomination phase could give again in the general election. Obama was counting on not only being able to raise more money than McCain, but also that the voters would not punish him for breaking his earlier promise.

Obama raised an additional \$337 million during the general election campaign, a figure nearly four times the public grant that McCain accepted.⁵⁸ McCain benefitted from significant spending by Republican party committees, but Obama's vastly larger budget allowed him to spend a record \$240 million on television advertising.⁵⁹ He was able to invest money in traditionally Republican states such as Indiana, Virginia, and North Carolina—three states Obama's campaign likely would have ignored absent his fundraising success.

This posed major strategic problems for the more limited McCain budget. As polls began showing competitive contests in Indiana, Virginia, and North Carolina, McCain was forced to decide between whether to move his resources there or whether to continue spending huge sums of money on advertising in the critical battleground states of Ohio, Florida, and Pennsylvania. By expanding the battlefield, Obama made the most of his considerable money advantage. It allowed his campaign to go on offense in states where Bush had won in 2004, forcing McCain to spend most of his time defending these states instead of the contested battleground states.

In the increasingly competitive state of Virginia, Obama spent \$24 million in television advertising, more than three times the \$7.4 million spent by McCain.⁶⁰ Obama went on to win Virginia in 2008—the first Democrat to do so since Lyndon Johnson in 1964. He also carried seven more states that went Republican in 2004: Indiana, North Carolina, Florida, Iowa, Colorado, New Mexico, and Nevada.

McCain's financial disadvantage was partially offset by an aggressive fundraising effort by the Republican National Committee (RNC). While most Democratic contributions went directly to the Obama campaign, Republican donors gave to party committees that could legally spend to help McCain. The RNC had a substantial cash advantage over its Democratic counterpart.⁶¹

Independent groups spent heavily in the final months of the campaign. Republican groups organized primarily through 501(c) committees that are not required to disclose expenditures or receipts.⁶² The U.S. Chamber of Commerce led the Republican groups, claiming more than \$36 million in spending.⁶³ Democratic 527 committees were also active, especially labor unions. Two of the top three spenders among 527 groups in 2008 were labor groups: AFSCME (\$32.9 million) and the SEIU (\$27 million).⁶⁴ The third top spender, America Votes (\$17.6 million) was a coalition made up of various progressive groups, but with organized labor again playing a significant role.⁶⁵ Many groups did electioneering without spending much money, placing ads on their Web sites and e-mailing links to members and to the press. MoveOn.Org sponsored a contest for college students to design innovative ads for Obama and created a viral e-mail that members could send to friends, inserting the friend's name in a fake news story that McCain had won the election by a single vote, because the friend had not elected to cast a ballot.⁶⁶ Such efforts by outside groups added to the tremendous amounts of money spent in the 2008 election.

THE EARLY STAGES OF THE 2012 ELECTION

As noted at the outset of the chapter, early fundraising for the complete field of 2012 Republican candidates was slow to start. Mitt Romney's single-day haul of \$10 million on May 16, 2011, was more than any one of his Republican competitors raised in total for the first half of the year (see Table 13.1). Congresswoman Michele Bachmann of Minnesota, who raised \$13.5 million for her 2010 re-election campaign to the U.S. House (which topped all other House challengers and incumbents), brought in \$3.6 million in the first half of 2011 for her presidential bid, most of which was a transfer from her congressional campaign committee.⁶⁷

Narrowly ahead of Bachmann were Congressman Ron Paul from Texas and former Minnesota Governor Tim Pawlenty, who raised \$4.5 million and \$3.9 million respectively.⁶⁸ Former House Speaker Newt Gingrich had an especially slow start to his presidential campaign. He finished the first half of the year with \$1 million in debt and only slightly more than \$300,000 cash on hand.⁶⁹ Compounding matters, nearly two dozen of Gingrich's staff resigned, including his two top fundraisers.

The Republican field, however, received a significant shakeup when Texas Governor Rick Perry entered the presidential contest in mid-August of 2011. Most public opinion polls showed Perry with a statistically significant lead in the immediate weeks following his announcement to join the race.⁷⁰ Perry's late entry into the 2012 presidential election seems unlikely to hinder

TABLE 13.1

Primary Election Receipts (in millions) for Declared Presidential Candidates, January through June 2011

	Total Receipts	Receipts from Individuals	Individual Contributions in Increments of . . .					
			\$200 or Less		\$201-\$2,499		\$2,500	
			(\$)	(%)	(\$)	(%)	(\$)	(%)
Obama, Barack	42.3	41.9	24.0	57.3	11.0	26.3	6.9	16.4
Romney, Mitt	18.4	18.2	1.3	6.9	3.8	20.6	13.2	72.5
Paul, Ron	4.5	4.5	2.4	54.2	1.6	34.8	0.5	11.0
Pawlenty, Timothy	3.9	3.8	0.5	13.0	1.0	26.7	2.3	60.3
Bachmann, Michele	3.6	1.6	1.1	67.7	0.4	25.8	0.1	6.5
Gingrich, Newt	2.1	2.1	1.0	49.6	0.4	21.6	0.6	28.8

Source: Authors' calculations of data obtained from the Federal Election Commission.

Notes: Contributions greater than the maximum allowed, awaiting resignation or reattribution, are assigned to the \$2,500 category. As some contributions are not itemized, the "\$200 or Less" category contains contributions for both the primary and general elections.

Barack Obama's contribution totals include contributions coming from his joint fundraising committee, Obama Victory Fund 2012.

Barack Obama and Timothy Pawlenty also raised \$5.2 million and \$0.6 million, respectively, in contributions designated for the general election.

his ability to raise funds. Indeed some experts expect his campaign to attract a large number of bundlers that will allow his campaign to exceed the totals of previous successful presidential candidates. As one account noted, “Bush had a total of 900 bundlers who were called Rangers or Pioneers. . . . Rick Perry, if he doesn’t stumble politically in the early months here, will have a bundling network that far exceeds 900 individuals.”⁷¹ Perry also has the early support of at least seven super PACs, which can raise and spend unlimited sums of money in the 2012 election.⁷² One of these super PACs, Make Us Great Again, founded by former Perry chief of staff Mike Toomey, announced early plans to spend \$55 million to help Perry win the GOP nomination.⁷³

Not to be outdone, Restore Our Future, a pro-Romney super PAC, announced that it had already raised \$12.3 million in the first six months of 2011.⁷⁴ Likewise, former White House aides to President Barack Obama have formed the super PAC, Priorities USA Action. The rise of super PACs, along with the advances in fundraising techniques developed in 2008, promise to make the 2012 election the most expensive in history.

THE FUTURE OF PRESIDENTIAL FUNDRAISING

Until recently, public financing of presidential elections had been a largely successful program, having disbursed nearly \$1.5 billion since its inception in 1976.⁷⁵ In 2000, however, the system developed its first serious crack when George W. Bush opted out of the primary phase and went on to raise considerably more money than the spending limit that would have applied had he accepted public funds. Bush’s subsequent victory and willingness to bypass the primary phase again in 2004 drove even two liberal Democrats—Howard Dean and John Kerry—away from the primary phase of the system four years later. By 2008, most of the leading candidates declined public funds in the primaries. The \$21.7 million in public funds that were distributed during the primary contest was the lowest since the government began matching contributions in 1976.⁷⁶ Barack Obama duplicated Bush’s feat in the general election, raising far more than the public grant would have provided without an apparent penalty among voters. This precedent has left the public financing system in serious jeopardy. Heading into the 2012 election, no serious presidential candidate appears likely to participate in the public finance program.

Some defenders of Obama claimed that his fundraising effort was “a parallel public financing system,” because many of his contributors gave small contributions.⁷⁷ They claimed that his campaign was financed by people of modest means and, therefore, was a different type of public fund. Yet many of those who made small contributions went on to give large aggregate sums.⁷⁸ Indeed, while the majority of Obama’s contributions came in small amounts, much of his money came from those who contributed large sums over the duration of the election cycle.

Some scholars have suggested a variety of reforms to the federal funding system, including increasing spending limits during the primaries or even eliminating them. This could induce some candidates to accept matching funds and in so doing reach out to less affluent donors. Other proposals include matching

small contributions at a higher rate of three or even four to one for each dollar of the first one hundred or two hundred dollars that a donor contributes.⁷⁹

Still, these reforms are unlikely to be enacted in the near future. In fact, recent momentum seems headed in the opposite direction. In January of 2011, the U.S. House of Representatives voted 239–160 to abolish the public finance system. Absent any new reforms, the basic rules of campaign finance appear to be in shambles, as the Supreme Court has continued to overturn portions of the regulatory framework.

In this new and almost fully deregulated environment created by the courts, ultra-wealthy interests now seem best positioned to dominate presidential fundraising in the 2012 election. American Crossroads, for example, received more than 90 percent of its money for the first six months of 2011 from just three billionaires.⁸⁰ Democratic-leaning groups have been similarly dependent on a small number of billionaires and wealthy donors in the early stages of the 2012 election.⁸¹

While the full story of presidential fundraising in the 2012 election has yet to be told at the time of this writing, preliminary accounts suggest that more money than ever before will be spent in the election. The courts have opened up new avenues for wealthy donors, corporations, labor unions, and newly organized super PACs to tap and spend money unlike any time since the pre-Watergate era. This development, along with ever-improving fundraising models and the effective demise of the public finance system, suggests that the present and future appear headed to an era of unprecedented presidential fundraising.

ENDNOTES

1. Delen Goldberg, "Mitt Romney Visits Las Vegas to Campaign, Fundraise," *Las Vegas Sun*, May 16, 2011, <http://www.lasvegassun.com/news/2011/may/16/mitt-romney-visits-nevada-campaign-fundraise> (accessed August 7, 2011).
2. Susan Page, "Obama, with Money on His Side, Still Seeks Traction," *USA Today*, October 2, 2007, http://www.usatoday.com/news/politics/election2008/2007-10-01-obama_cover_N.htm (accessed August 19, 2011). See also Michael J. Malbin, "Small Donors, Large Donors and the Internet: The Case for Public Financing after Obama," Campaign Finance Institute, April 2009, http://www.cfinst.org/president/pdf/PresidentialWorkingPaper_April09.pdf (accessed August 19, 2011).
3. "2008 Presidential Campaign Activity Summarized: Receipts Nearly Double 2004 Total," Federal Election Commission, June 8, 2009, <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (accessed August 19, 2011).
4. Patricia Zengerle, "Analysis: Billion-Dollar Obama to Run Moneyed Campaign," Reuters, April 4, 2011, <http://www.reuters.com/article/2011/04/04/us-usa-election-obama-analysis-idUSTRE7330NY20110404> (accessed August 19, 2011).
5. Clyde Wilcox, "Internet Fundraising in 2008: A New Model?" *The Forum* 6 (2008): Article 6.
6. Wilcox, "Internet Fundraising in 2008: A New Model?"
7. Malbin, "Small Donors, Large Donors and Internet: The Case for Public Financing after Obama."
8. Katharine Q. Seelye and Leslie Wayne, "The Web Takes Ron Paul for a Ride," *The New York Times*, November 11, 2007, <http://www.nytimes.com/2007/11/11/us/politics/11paul.html> (accessed August 19, 2011).
9. Andy Barr, "'Money Bomb Blows Up Ron Paul's Coiffers,'" *Politico*, February 22, 2011, <http://www.politico.com/news/stories/0211/49956.html> (accessed August 19, 2011).

10. Andy Barr, "Exclusive: Ron Paul's \$3M Pot of Gold," *Politico*, March 31, <http://www.politico.com/news/stories/0311/52317.html> (accessed August 19, 2011).
11. Michael Isikoff, "Firm Gives \$1 Million to Pro-Romney Group, Then Dissolves," MSNBC, August 4, 2011, http://www.msnbc.msn.com/id/44011308/ns/politics-decision_2012/t/firm-gives-million-pro-romney-group-then-dissolves (accessed August 19, 2011).
12. Peter Baida, "The Legacy of Dollar Mark Hanna," in *The Quest for National Office: Readings on Elections*, ed. Stephen J. Wayne and Clyde Wilcox (New York: St. Martin's Press, 1992).
13. Nathan Miller, *Theodore Roosevelt: A Life* (New York: William Morrow and Company, 1992), 245.
14. Robert K. Goidel, Donald A. Gross, and Todd G. Shields, *Money Matters: Consequences of Campaign Finance Reform in U.S. House Elections* (Lanham, Md: Rowman & Littlefield, 1999), 21.
15. Anthony Corrado, "Money and Politics: A History of Federal Campaign Finance Law," in *The New Campaign Finance Sourcebook*, ed. Anthony Corrado, Thomas E. Mann, Daniel Ortiz, Trevor Potter (Washington, DC: Brookings Institution, 2005).
16. "Presidential Fund Income Tax Check-Off Status," Federal Election Commission, January 2011, http://www.fec.gov/press/bkgnd/pres_cf/PresidentialFundStatus_Jan2011.pdf (accessed August 19, 2011).
17. "Presidential Election Campaign Fund," Federal Election Commission, <http://www.fec.gov/press/bkgnd/fund.shtml> (accessed August 19, 2011).
18. "Presidential Election Campaign Fund."
19. "Presidential Election Campaign Fund."
20. Anthony Corrado, "Public Funding of Presidential Campaigns," in *The New Campaign Finance Sourcebook*, ed. Anthony Corrado, Thomas E. Mann, Daniel Ortiz, Trevor Potter (Washington, DC: Brookings Institution, 2005), 194.
21. Corrado, "Public Funding of Presidential Campaigns."
22. "Presidential Spending Limits: If the Election Were Held in 2011," Federal Election Commission, http://www.fec.gov/pages/brochures/pubfund_limits_2011.shtml (accessed August 19, 2011).
23. "FEC Reports Increase in Party Fundraising for 2000," Federal Election Commission, May 15, 2001, <http://www.fec.gov/press/press2001/051501partyfund/051501partyfund.html> (accessed August 19, 2011).
24. Michael J. Malbin, "A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004," in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act*, ed. Michael J. Malbin (Lanham, Md: Rowman & Littlefield, 2006), 222.
25. Michael J. Malbin, "A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004," in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act*, ed. Michael J. Malbin (Lanham, Md: Rowman & Littlefield, 2006), 222.
26. Malbin, "Small Donors, Large Donors and Internet: The Case for Public Financing after Obama."
27. Malbin, "Small Donors, Large Donors and Internet: The Case for Public Financing after Obama."
28. Linda Greenhouse and David D. Kirkpatrick, "Justices Loosen Ad Restrictions in Campaign Finance Law," *The New York Times*, June 26, 2007, <http://www.nytimes.com/2007/06/26/washington/26scotus.html> (accessed August 19, 2011).
29. Spencer MacColl, "Citizens United Decision Profoundly Affects Political Landscape," Center for Responsive Politics, <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html> (accessed June 30, 2011).
30. Michael Isikoff, "Billionaires Give Big to New 'Super PACs' " MSNBC, June 26, 2011, http://www.msnbc.msn.com/id/43541131/ns/politics-decision_2012/t/billionaires-give-big-new-super-pacs/?ns=politics-decision_2012&t=billionaires-give-big-new-super-pacs (accessed June 30, 2011).
31. Matt Bai, "This Donation Cycle Catches G.O.P. in the Upswing," *The New York Times*, October 20, 2010, <http://www.nytimes.com/2010/10/21/us/politics/21bai.html> (accessed August 19, 2011).
32. Isikoff, "Billionaires Give Big to New 'Super PACs.'"
33. Malbin, "Small Donors, Large Donors and the Internet: The Case for Public Financing after Obama."

34. "Data Available for Barack Obama," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?id=n00009638> (accessed August 19, 2011).
35. Peter L. Francia, John C. Green, Paul S. Herrnson, Lynda W. Powell, and Clyde Wilcox, *The Financiers of Congressional Elections: Investors, Ideologues, and Intimates* (New York: Columbia University Press, 2003).
36. Francia et al. *The Financiers of Congressional Elections*.
37. Francia et al. *The Financiers of Congressional Elections*.
38. "Data Available for Ralph Nader," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00000086> (accessed August 19, 2011); "Data Available for Bob Barr," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00002526> (accessed August 19, 2011); "Data Available for Cynthia McKinney," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00002511> (accessed August 19, 2011).
39. Beth Fouhy, "Clinton Aims to Raise \$75M Before 2008," *The Washington Post*, February 7, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/07/AR2007020700968.html> (accessed August 29, 2011). See also Michael Luo and Christopher Drew, "Obama and McCain Lag in Naming 'Bundlers' Who Rake in Campaign Cash," *The New York Times*, July 11, 2008, <http://www.nytimes.com/2008/07/11/us/politics/11bundlers.html> (accessed August 29, 2011).
40. Luo and Drew, "Obama and McCain Lag in Naming 'Bundlers' Who Rake in Campaign Cash."
41. Richard W. Stevenson, "Bush Raises \$3.5 Million for His Re-Election Campaign," *The New York Times*, June 18, 2003, <http://www.nytimes.com/2003/06/18/us/bush-raises-3.5-million-for-his-re-election-campaign.html> (accessed August 29, 2011).
42. Clifford W. Brown, Jr., Lynda W. Powell, Clyde Wilcox, *Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns* (New York: Cambridge University Press, 1995).
43. Brown, Powell, Wilcox, *Serious Money*.
44. Brown, Powell, Wilcox, *Serious Money*. See also Francia et al. *The Financiers of Congressional Elections*.
45. Lee Rainie, John Horrigan, and Michael Cornfield, "The Internet and Campaign 2004," Pew Internet, May 6, 2005, <http://www.pewinternet.org/Reports/2005/The-Internet-and-Campaign-2004/3-The-political-and-media-landscape-in-2004.aspx?view=all> (accessed August 19, 2011).
46. David L. Miller, "Money, Money Everywhere—And Not a Dime for Coffee," CBS News, October 17, 2007, http://www.cbsnews.com/8301-502163_162-3378568-502163.html (accessed August 19, 2011).
47. Page, "Obama, with Money on His Side, Still Seeks Traction."
48. Michael Malbin, "All CFI Funding Statistics Revised and Updates for the 2008 Presidential Primary and General Election Candidates," Campaign Finance Institute, January 8, 2010, http://www.cfinst.org/Press/Releases_tags/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx (accessed August 19, 2011).
49. Joshua Green, "The Amazing Money Machine," *The Atlantic*, June 2008, <http://www.theatlantic.com/doc/200806/obama-finance> (accessed September 7, 2009).
50. Green, "The Amazing Money Machine."
51. Green, "The Amazing Money Machine."
52. Green, "The Amazing Money Machine."
53. Richard S. Dunham and Dwight Silverman, "Favored Obama Address Begins with http, Not 1600," *Houston Chronicle*, November 8, 2008, <http://www.chron.com/disp/story.mpl/nation/6102843.html> (accessed September 7, 2009).
54. "Data Available for Ron Paul," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?cid=N00005906&cycle=2008> (accessed August 19, 2011).
55. Philip Elliot, "Romney's Strategy Hopes to Reverse 2008 Outcome," Real Clear Politics, April 2, 2011 (accessed August 19, 2011).
56. "Data Available for John McCain," Center for Responsive Politics, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00006424> (accessed August 19, 2011).
57. "Data Available for Barack Obama."

58. Malbin, "Small Donors, Large Donors and Internet: The Case for Public Financing after Obama."
59. Fredreka Schouten, "Obama's Fundraising Obliterates Records," *USA Today*, December 2, 2008, http://www.usatoday.com/news/politics/election2008/2008-12-02-obama-money_N.htm (accessed August 19, 2011).
60. Schouten, "Obama's Fundraising Obliterates Records."
61. See for example, David B. Magleby, ed., *The Change Election: Money, Mobilization, and Persuasion* (Philadelphia: Temple University Press, 2011).
62. Stephen R. Weissman, "Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election," Campaign Finance Institute, February 25, 2009, http://www.cfinst.org/press/preleases/09-02-25/Soft_Money_Political_Spending_by_Nonprofits_Tripled_in_2008.aspx (accessed August 19, 2011).
63. Weissman, "Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election," http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table1.pdf
64. Weissman, "Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election," http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table2.pdf
65. Weissman, "Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election," http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table2.pdf
66. Karlene Lukovitz and Nina Lentini, "Moveon.org Shows Viral's Power with Obama Vid," *Marketing Daily*, October 30, 2008, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_id=93643 (accessed September 7, 2009).
67. "Bachmann for President" Disclosure Report (#736307). <http://query.nictusa.com/pres/2011/Q2/C00497511.html> (accessed September 9, 2011). Bachmann also raised additional money through her congressional campaign committee. See also Brian Bakst, "Small Checks Drive Michelle Bachmann's Big Bucks," *Real Clear Politics*, June 24, 2011, http://www.realclearpolitics.com/articles/2011/06/24/small_checks_drive_michele_bachmanns_big_bucks_110352.html (accessed August 19, 2011). See also "Bachmann for President Announces \$4.2 Million at End of 2nd Quarter," July 15, 2011, <http://www.michelebachmann.com/2011/07/bachmann-for-president-announces-4-2-million-at-end-of-2nd-quarter> (accessed August 19, 2011).
68. "Ron Paul 2012 Presidential Campaign Committee Campaign" Disclosure Report (#736407). <http://query.nictusa.com/pres/2011/Q2/C00495820.html> (accessed September 9, 2011). "Pawlenty for President" Disclosure Report (#735917). <http://query.nictusa.com/pres/2011/Q2/C00494393.html> (accessed September 9, 2011). Receipts are for the primary election only. Pawlenty also raised \$0.6 million designated for the general election. See also Nicholas Confessore, "Pawlenty Raises \$4.5 Million for Race," *The New York Times*, July 14, 2011, <http://www.nytimes.com/2011/07/15/us/politics/15donate.html> (accessed August 19, 2011).
69. "Newt 2012" Disclosure Report (#736038). <http://query.nictusa.com/pres/2011/Q2/C00496497.html> (accessed September 9, 2011). See also Kendra Marr, "Newt's Fundraising Approach is No Fundraisers," *Politico*, August 18, 2011, <http://www.politico.com/news/stories/0811/61593.html> (accessed August 19, 2011).
70. Jeffrey M. Jones, "Perry Zooms to Front of Pack for 2012 GOP Nomination," *Gallup*, August 24, 2011, <http://www.gallup.com/poll/149180/perry-zooms-front-pack-2012-gop-nomination.aspx> (accessed September 10, 2011).
71. Ben Philpott, "New Fundraising Calculus Unlikely to Hinder Perry," *The Texas Tribune*, August 24, 2011, <http://www.texastribune.org/texas-politics/2012-presidential-election/rick-perry-hits-fundraising-trail> (accessed September 10, 2011).
72. Philpott, "New Fundraising Calculus Unlikely to Hinder Perry."
73. Paul Blumenthal, "Super PAC for Rick Perry Plans to Raise, Spend \$55 Million," *Huffington Post*, September 6, 2011, http://www.huffingtonpost.com/2011/09/06/rick-perry-super-pac-55-million_n_951206.html (accessed September 10, 2011).
74. "Restore Our Future" Pro-Romney Super PAC Rakes in \$12.3 Million," *Mitt Romney Central*, August 1, 2011, <http://mittromneycentral.com/2011/08/01/restore-our-future-pro-romney-super-pac-rakes-in-12-3-million/> (accessed September 10, 2011).
75. "2008 Presidential Campaign Activity Summarized: Receipts Nearly Double 2004 Total."

76. "2008 Presidential Campaign Activity Summarized: Receipts Nearly Double 2004 Total."
77. Brian Montopoli, "Obama Poised to Turn Down Public Financing," CBS News, February 11, 2009, <http://www.cbsnews.com/stories/2008/04/09/politics/main4004908.shtml>.
78. Michael Malbin, "Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004," Campaign Finance Institute, November 24, 2008, http://www.cfinst.org/Press/PReleases/08-11-24/Realty_Check_-_Obama_Small_Donors.aspx (accessed August 19, 2011).
79. Jeffrey Bell, J. Kenneth Blackwell, Anthony Corrado, Carol Darr, Richard H. Davis, Donald J. Foley, Ruth S. Jones, Michael J. Malbin, Charles T. Manatt, Ross Clayton Mulford, and Phil Noble, "So the Voters May Choose...Reviving the Presidential Matching Fund System," Campaign Finance Institute, 2005, <http://www.cfinst.org/president/pdf/VotersChoose.pdf>. See also Michael J. Malbin, "The One Percent Solution," The Campaign Finance Institute, July 25, 2011, http://www.cfinst.org/Press/PReleases/11-07-26/One_Percent_Solution_Michael_Malbin_s_CFI_response_to_Buddy_Roemer_in_Boston_Review_forum.aspx (accessed August 1, 2011).
80. Isikoff, "Billionaires Give Big to New 'Super PACs.'"
81. Isikoff, "Billionaires Give Big to New 'Super PACs.'"

Reading 14

The Magnitude of the 2008 Democratic Victory: By the Numbers

JAMES W. CEASER AND DANIEL DISALVO

People commonly exaggerate the magnitude of events that take place in their day, probably to flatter themselves about the significance of their own lives and times. Journalists, keen to feed the public what it wants, contribute mightily to this amplification. This tendency to inflate was on vivid display in many interpretations of the Democrats' 2008 electoral victory, which ranged from claims that it was "unprecedented" and "historic" to unqualified assertions that it was "a genuinely realigning election." *Time* magazine went so far as to suggest a likeness to Franklin Roosevelt's victory of 1932, printing a cover that morphed Barack Obama's head onto a iconic photo of FDR sporting his '30's-style "lid" and driving a convertible.¹

The 2008 Democratic triumph was no doubt impressive—how much so will be seen shortly—but it was far from being massive, or even unusual, by historical standards. Looking at the record, even if that proves tedious, provides some perspective. There have been 29 presidential contests since 1896, a year many scholars use as the starting point of "modern politics." Barack Obama won the presidency with a share of the popular vote of just under 53 percent, which ranks 14th, or at the median (Table 14.1). His margin of

TABLE 14.1

The Magnitude of Presidential Victories

Margin	Election	Winning Candidate	Losing Candidate	Winners %	Electoral College %	Senate Midterm	House Midterm	Senate-4yrs	House-4yrs
Dead Heats									
-0.5	2000	G. W. Bush (R)	Gore (D)	47.9	50.4	-5	-2	-5	-7
0.2	1960	Kennedy (D)	Nixon (R)	49.7	56.4	-1	-20	13	29
0.7	1968	Nixon (R)	Humphrey (D)	43.4	55.9	7	4	11	52
2.1	1976	Carter (D)	Ford (R)*	50.1	55.2	1	1	5	50
Squeakers.									
2.5	2004	G. W. Bush (R)	Kerry (D)	50.7	53.2	4	3	5	11
3.1	1916	Wilson (D)	Hughes (R)	49.2	52.2	-2	-16	3	-77
4.3	1896	McKinley (R)	Bryan (D)	51	60.6	5	-48	9	*
4.5	1948	Truman (D)	Dewey (R)	49.6	57.1	9	75	-3	21
Moderately Competitive									
5.6	1992	Clinton (D)	Bush (R)	43	68.8	1	-9	2	-2
6.1	1900	McKinley (R)	Bryan (D)	51.7	65.3	0	13	7	-6
6.9	2008	Obama (D)	McCain (R)	52.9	67.8	8	23	12	54
7.5	1944	F. Roosevelt D	Dewey (R)	53.4	81.4	0	20	*	-25
7.7	1988	G. Bush (R)	Dukakis (D)	53.4	79.2	1	-2	-8	-7
8.5	1908	Taft (R)	Bryan (D)	51.6	66.5	-1	-4	2	-32
8.5	1996	Clinton (D)	Dole	49.2	70.4	-3	2	-12	-52

Big Wins

9.7	1980	Reagan (R)	Carter (D)	50.8	90.9	12	34	15	49
10	1940	F. Roosevelt (D)	Willkie (R)	54.7	84.6	-3	5	-10	*
10.8	1952	Eisenhower (R)	Stevenson (D)	55.2	83.2	1	22	6	50

Landslides

14.4	1912	Wilson (D)	Taft (R)**	41.8	82.0	7	61	19	119
15.4	1956	Eisenhower (R)	Stevenson (D)	57.4	86.1	0	-2	-1	-20
17.5	1928	Hoover (R)	Smith (D)	58.2	83.6	8	32	2	23
17.7	1984	Reagan (R)	Mondale (D)	58.8	97.6	-1	16	0	-0
17.8	1932	F. Roosevelt (D)	Hoover (R)	57.4	88.9	12	97	20	149
18.8	1904	T. Roosevelt (R)	Parker (D)	56.4	70.6	1	44	2	51
22.6	1964	Johnson (D)	Goldwater (R)	61.1	90.3	2	36	4	32
23.2	1972	Nixon (R)	McGovern (D)	60.7	96.7	-2	12	-1	0
24.3	1936	F. Roosevelt D	Landon (R)	60.8	98.5	7	12	17	21
25.2	1924	Coolidge (R)	Davis (D)	54	71.9	1	22	-5	"55
26.2	1920	Harding (R)	Cox (D)	60.3	76.1	10	62	17	88

*Incumbents are in **Bold**.

** In 1912, although Taft was the incumbent, Theodore Roosevelt actually came in second to Woodrow Wilson. Wilson's margin of victory is thus calculated for the differences between him and Roosevelt.

Sources: Dave Leip's Atlas of U.S. Presidential Elections, <http://www.uselectionatlas.org/>; Changes in Senate party strength were calculated from the official U.S. Senate Web site, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partdiv.htm; Changes in House party strength were calculated from: <http://www.emailthecongress.com/partv-strength-house.html>; *Biographical Directory of the U.S. Congress*; Congressional Research Service; Office of the Clerk of the U.S. House of Representatives, <http://clerk.house.gov/archiv/househistory/partvDiv.html>

victory over his rival (6.9 percent) ranks as the 19th largest, or slightly below the median. Finally, his electoral vote percentage (a figure almost always magnified relative to the popular vote) was 67.8, or 17th among the 29 contests.

The most helpful figure in determining the magnitude of a presidential victory is the popular vote margin because it “controls” for the problem of third-party candidacies. On the basis of this figure, presidential elections can be sorted into five different categories: (1) the near-to-dead heats (a margin of less than two percent), which must include George W. Bush’s election of 2000, when he lost the national popular vote; (2) the squeakers (a margin of 3 to 5 percent), of which George W. Bush’s 2004 victory was the squeakiest; (3) the moderately competitive races (6 to 9 percent); (4) the big wins (10 to 12 percent), with Ronald Reagan’s 1980 victory over Jimmy Carter being the most recent; and (5) the landslides (more than 13 percent), the largest and also the least memorable of which was Warren G. Harding’s 26-point thumping of James M. Cox in 1920.²

Obama’s victory fits squarely into the moderately competitive category, which happens to correspond to the “feel” of the race as experienced by the American public. As the election neared, all the major polls had Obama ahead, but a few were at or near the margin of error. A last-minute swing of only two or three points, in just the right places, could have produced an upset.³ This outside possibility gave the last weeks of the 2008 election an air of expectation that kept many riveted to the press coverage and the blogosphere. Some appear to be suffering symptoms of withdrawal to this day.

The actual outcome was in no way surprising. When the television networks reported early on election eve that Obama won Pennsylvania, a state that John McCain needed in order to pull off his improbable inside straight, it was clear the race was over. Unlike 2004 (or 2000), there would be no waiting until the wee hours of the morning (or for five weeks) to learn who had won. Better still, there was no talk of recounts or of litigation; the armies of lawyers that were at the ready, their briefs fixed like bayonets, were demobilized and sent back to their barracks. Something happened that Americans who had come of political age since 1996 had never seen: the election of a president without accusations of perfidy or ballot manipulation.

To take a more fine-grained measure of Barack Obama’s victory, it is helpful to look at the subset of elections of *first-term* presidential victories (Table 14.2). Not surprisingly, the larger victory margins have tended to occur in cases when a popular incumbent is re-elected, such as Ronald Reagan in 1984 or Franklin Roosevelt in 1936, while more of the narrower margins, including all of the “dead heats,” take place in elections involving candidates ascending to the office for the first time. In this more limited group, Obama fares slightly better, ranking 10th among the 16 first-term presidents. His victory was not as large as Ronald Reagan’s in 1980 or George H. W. Bush’s in 1988, but it was greater than Jimmy Carter’s in 1976, Bill Clinton’s in 1992, and, of course, George W. Bush’s in 2000. Indeed, Obama had the largest margin of victory of any incoming *Democratic* president since FDR in 1932.

Analyzing the scope of congressional victories in a historical perspective is trickier, as much depends on the position from which a party begins:⁴ It is harder

TABLE 14.2**First Term Presidential Victories Ranked by Margin of Victory**

Rank	Election	Winner	Loser	Winners Percentage	Margin of Victory	Electoral College Percentage
1.	1920	Harding (R)	Cox (D)	60.3	26.2	76.1
2.	1924	Coolidge (R)	Davis (D)	54	25.2	73.8
3.	1932	F. Roosevelt (D)	Hoover (R)	57.4	17.8	88.9
4.	1928	Hoover (R)	Smith (D)	58.2	17.7	83.6
5.	1912	Wilson (R)	Taft (R)	41.8	14.5	82.0
6.	1952	Eisenhower (R)	Stevenson (D)	55.2	10.8	83.2
7.	1980	Reagan (R)	Carter (D)	50.8	9.7	90.9
8.	1908	Taft (R)	Bryan (D)	51.6	8.5	66.5
9.	1988	G. Bush (R)	Dukakis (D)	53.4	7.7	79.2
10.	2008	Obama (D)	McCain (R)	52.9	6.9	67.8
11.	1992	Clinton (D)	Bush (R)	43	5.6	68.8
12.	1896	McKinley (R)	Bryan (D)	51	4.3	60.6
13.	1976	Carter (D)	Ford (R)	50.1	2.1	55.2
14.	1968	Nixon (R)	Humphrey (D)	43.4	0.7	55.9
15.	1960	Kennedy (D)	Nixon (R)	49.7	0.2	56.4
16.	2000	G. W. Bush (R)	Gore (D)	47.8	-0.5	50.5

to pick up seats when a party already has many of them than when it is starting from a low base. In addition, more has changed in the system of congressional elections across time, including the direct election of senators, which began in 1914, and the rules and practices governing the drawing of district boundaries for House seats. For what it suggests, however, the Democratic congressional victory of 2008, relative to the midterm election of 2006, falls in the upper range of congressional victories in a presidential year (see Table 14.1). The pickup of seats in the Senate (eight, including a Minnesota seat decided six months after the balloting) is the sixth largest since 1896 (although tied with five other elections), and the 10th largest for the House (21 seats with one seat still being decided).⁵ Looking at the results of the Senate and the House together, there have been only six presidential election years in which a party has either held its own or gained more seats in both the Senate and the House (1948, 1980, 1912, 1928, 1932, and 1920).

THE BIGGER STORY

The statistical portrait just provided depicts what is on its own terms a substantial Democratic victory in 2008. Yet to grasp the full significance of the election, it needs to be looked at in light of what happened since the previous

presidential contest. The combined impact of 2008 with the 2006 midterm election dramatically transformed the political scene in America, turning a red nation into a blue one. Yet this reversal of party fortunes is all the more important because of what the 2004 election meant for the Republican Party. That election represented the high-water mark for the GOP since 1952, when Dwight Eisenhower was chosen (and arguably since 1928, when Herbert Hoover won).

Granted, the Republicans since 1952 had won the presidency by much greater margins, including three landslides (Eisenhower in 1956, Nixon in 1972, and Reagan in 1984). But unless one counts 2000, when the Republicans limped into control of all three institutions while losing the popular vote for the presidency and managing only a tie in the Senate, 2004 was the only election since 1952 in which Republicans emerged holding a majority in all three branches. (By contrast, Democrats had majorities in all institutions following the elections of 1960, 1964, 1976, 1992, and 2008.) And 2004 was the only time since 1952 that Republicans won each branch and gained ground in each institution. With 55 senators, Republicans equaled their largest number in that chamber since 1929 (the GOP had achieved that number on three other occasions, from 1987 to 1989, 1997 to 1999, and 1999 to 2001), and they secured their largest majority in the House since 1929.

The Republican victory in 2004 fulfilled at long last one of the hopes of the “new” Republican Party that had been born under Ronald Reagan in 1980. Beginning in 1980, the Republicans achieved some notable victories: Reagan’s own election along with a Republican Senate (but still a Democratic House), and the stunning 1994 GOP congressional victory in both the House and Senate during Bill Clinton’s first presidential term. Yet they had never attained a majority across the board. Many Republicans, and not just Republicans, looked at 2004 as a plateau on which the GOP would consolidate and begin a climb to a more commanding majority status. The titles of some of the books published after the election, including *One Party Country* and *Building Red America*, were indicative of this assessment.⁶ There was much speculation that the GOP could win that most coveted and elusive of prizes in American politics (if it exists at all): the Holy Grail of a favorable partisan realignment.

By 2006, these GOP hopes had been dashed, and entering 2008 Republicans were fighting just to hang on. The explanation for the decline and fall of the Republican empire, short-lived as it was, is to be found largely on the streets of Baghdad and New Orleans. George W. Bush lost the mandate of heaven sometime in the period between 2005 and 2006, and the Republicans in Congress never mastered the art of being a responsible governing party. The magnitude of the partisan change that occurred in the consecutive elections of 2006 and 2008 is the conclusion to this story. Democrats gained 12 Senate seats and 49 House seats, moving in the process—in 2006—from minority to majority status in both chambers. After the 2008 elections, the Democratic congressional majorities surpassed by a significant margin the Republican majorities after 2004 (Table 14.3). Since 1932, Republicans have barely had a moment in the sun.

TABLE 14.3**Changes in Congressional Party Strength: 2000–2008**

Republicans–Democrats–Independents

Year	Senate	House
2000	50R-50D	221R-212D 2I
2002	51R-48D 1I	229 R-204D 1I
2004	55R-44D 1I	232 R-201D 1I
2006	49R-50D 1I	198 R-234D
2008	41R-59D 1I	178 R-257D

There are many ways to assess congressional gains made since the last presidential election (see the final two columns of Table 14.1 or Table 14.3). But however one looks at it, the 2008 Democratic “surge” for consecutive elections (with gains in both elections) is striking. It would be ranked about fifth, on a rough par with what Republicans achieved with Reagan’s victory in 1980, but well short of the party gains that occurred at the time of FDR’s triumphs in 1932 or 1936, Harding’s in 1920, and Wilson’s in 1912.

As is well known, the domestic policy-making process in the U.S. is normally characterized by slow action, a result that derives from the structural requirement of consent by three power centers (the presidency, the Senate, and the House). There are occasional exceptions, such as Wilson’s New Freedom, FDR’s New Deal, and LBJ’s Great Society, when the policy process temporarily resembles parliamentary governments and huge new legislative programs are enacted. These periods are associated with some of the surge elections noted previously. Of course, the incoming president must be one who wants an active agenda, which excludes Harding and Eisenhower, as well as one who controls a solid majority in both houses, a factor that slowed Reagan in 1980. Add a crisis (or at least talk of one) and the conditions that favor a major policy shift are enhanced still further. Obama will enter the White House with some of these conditions fulfilled, but with nothing approaching the size and scope of the personal victory of these other presidents.

It is a sobering lesson to some of those who experienced these surges to discover how quickly they can be reduced or overturned. The Eisenhower government elected in 1952 won control of all three national electoral institutions by picking up one seat in the Senate and 22 in the House. Two years later, the Republicans were in the minority in both chambers, losing 18 seats in the House and one in the Senate. In 1982, two years after Reagan won the White House and Republicans gained 12 seats (and the majority) in the Senate plus 34 in House, the GOP gained one seat in the Senate but gave back 26 seats in the House. In 1920, Harding’s landslide brought in its wake 10 new Republican senators and 62 House members, only to see the party lose six seats in the

Senate two years later and a whopping 77 in the House (though still enough in both cases to keep the majority).

Democrats in comparable circumstances have had more luck, or shown better skill. In 1912, Wilson's coattails brought in seven new senators and 61 representatives. The 1914 election produced mixed results, as Democrats picked up four more seats in the Senate but slipped back in the House to where they were before 1912, losing 61 seats but still controlling the chamber. The elections of the 1930s were so overwhelmingly favorable to one party as to set this period apart from all others. In 1934, Democrats continued their rout of the GOP, winning nine more seats in the House and 10 seats in the Senate. Just when it looked as if the Democrats could go no higher, Roosevelt's second landslide of 1936 led to a gain of 12 more seats in the House, reducing the GOP to a paltry 88 members, and seven more seats in the Senate, shrinking Republican Conference meetings to the size of a modest dinner party (at 16 members).⁷

It is no wonder, then, that some of President-Elect Obama's enthusiasts in the media have him riding in FDR's convertible. Even if more frequent historical patterns hold, and Democrats should slip in the 2010 congressional elections, they would have to suffer a huge reversal to lose control of either chamber. The most likely scenario at the moment is that Democrats will probably lose some House seats but hold or improve their position in the Senate. The House GOP has nowhere to go but up, as there is a fairly large quotient of Democrats holding seats in districts that voted for Bush and McCain. It is also hard to see how the number of Republicans in the House can get much smaller, as there are only five members that won seats in districts that voted for Kerry and Obama. The 2010 Senate elections look much more favorable to the Democrats, as some older Republicans are likely to retire and very few of the Democrats up for reelection appear (for now at least) to be vulnerable.⁸ In this respect, although Obama's victory was less impressive than Wilson's, 2008 appears structurally to be closest to 1912 in terms of the large Democratic congressional majorities that can sustain some losses and still be workable governing entities.

WAS 2008 A REALIGNING ELECTION?

Party realignment is currently among the most contested concepts in political science, with some arguing that the idea should be retired altogether, and others holding that, shorn of certain outsized connotations, it remains helpful.⁹ Whatever the state of the academic debate, journalists and pundits have not retreated from hauling the bounty of political science theorizing into the political arena. Many liberal commentators, not surprisingly, were quick to declare the Obama victory a realignment. According to *The Washington Post* columnist Harold Meyerson, Obama's margins "among decisive and growing constituencies make clear that this was a genuinely realigning election."¹⁰ For John Judis of *The New Republic*, the election "is the culmination of a Democratic realignment that began in the 1990s, was delayed by September 11, and resumed with the 2006 election."¹¹

Dispensing with the more fantastic notions that some of the originators of the concept ascribed to it, a realignment can be conceived as a major electoral

shift in the relative strength of the political parties (and therefore likely to endure for awhile), accompanied or sealed by a shift in the reigning political ideas that set government's agenda, plus a major change in the direction of public policy. By this definition, it is clear that a "realigning election" can only be determined well after the fact: it is something projected backward in light of an assessment of the performance of an administration following an election like 1932.

Yet even if there are such things as realignments, their significance for electoral outcomes can be greatly exaggerated. They are only part of the story. A realignment is not a guarantee—nowhere close to it—that the favored party will win future elections. American presidential elections are influenced both by an alignment (meaning the tendency of partisans to vote their party preference) *and* by a relatively freestanding assessment by many voters at each election of the performance of the incumbent and the incumbent party, weighed against the merits of an alternative. With the exception of one or two periods in American history, when the alignment may have provided one party with a truly commanding lead over the other, the aligned portion of the electorate is too small relative to the assessing portion to determine the outcome.

What an alignment in a party's favor provides, therefore, is an advantage, all things being equal. But all things are almost never equal in politics. And because the alignment itself is influenced by ongoing assessments, it too may not endure for very long. The advantage is even countered slightly by the apparent political law that after a certain point, holding power means accumulating grievances more than winning plaudits. If one were to apply, albeit prematurely, the elements of a partisan realignment to the 2008 Democratic victory, then, a case by and *against* the claim can be made.

In favor is the argument that Obama's 7 percent margin has greater significance than usual, because it occurred on the first truly "open" presidential election (one in which no sitting president or vice-president was running) since 1952; because it was accompanied by expanded Democratic congressional majorities; because it comes amid survey evidence of fall-off in Republican party identification; and finally, because the coalition that helped elect Obama portends longer term Democratic dominance, because the constituencies that comprise it are growing segments of the electorate. Those constituencies are Latinos, youth, and professionals. According to exit polls, Obama won 66 percent of the Latino vote, a group that is growing, and which was a key to his victories in states such as New Mexico, Colorado, and Florida. Obama won 66 percent of voters between the ages of 18 and 29, which some believe signals their allegiance to the Democratic party for the longer term. Obama also appealed enormously to the highly educated (or well-schooled), doing extremely well among voters with advanced degrees.¹²

On the flip side, it has been said that while Obama won in an "open" election, the unpopularity of the incumbent was in fact a huge factor pulling against John McCain; that, as noted, a 7-percent victory in the popular vote was hardly a rout and that but for the (contingent) financial crisis that struck in mid-September, McCain had a good shot; that Obama enjoyed a massive advantage in campaign funds; and that the electoral map did not change all that decisively. Although Obama won striking victories in three states that were not competitive in 2000 or

2004 (Virginia, North Carolina, and Indiana), most of the states (Florida, Ohio, New Hampshire, and New Mexico) that were competitive in the prior two elections remained battlegrounds this year.

In terms of new governing ideas, it appears less that the Democratic Party has anything particularly new on tap than that it is more self-confident in asserting its traditional liberal agenda. One of the striking things about the Obama campaign was that he did not propose a new programmatic direction, such as claiming to be a “New Democrat.” His appeal was largely based on valence issues and themes (like change and post-partisanship) rather than on clearly stated positions. This leaves much to be filled in, which is what is happening as this is written. What cannot be said at this point is that there is evidence of a decisive ideological shift in Americans’ thinking. Exit polls showed that 51 percent of Americans believed government “should do more”—a reversal of the Reagan-era majorities that thought government should do less. But the proportion of voters describing themselves as liberal, moderate, and conservative stayed roughly the same compared with four years ago. Andrew Kohut of the Pew Research Center argues that: “This was an election where the middle asserted itself,” and that there was “no sign” of a “movement to the left.”¹³

Events are often more important than elections in shaping the strategies of presidents once they are in office. The current economic crisis has opened the door for an activist agenda far wider than anyone earlier might have imagined. Already, Obama’s newly appointed Chief of Staff Rahm Emanuel, has claimed: “You never want a serious crisis to go to waste.” To avoid any misunderstanding, he went on, “What I mean by that is an opportunity to do things you think you could not do before.”¹⁴ With an extended honeymoon period about to begin, all await what the marriage between Barack Obama and the American public will beget.

ENDNOTES

1. *Time Magazine*, Vol. 172, No. 24, November 24, 2008; Ryan Lizza, “How Obama Won,” *The New Yorker*, November 17, 2008.
2. For a categorization of presidential elections on a similar basis, see, Lee Sigelman and Emmet Buell, *Attack Politics: Negative Campaigning in Presidential Elections Since 1960* (Lawrence: University Press of Kansas, 2007).
3. None of the major polls had McCain ahead, but a few of them had him within or just beyond the margin of error. For those interested in the polling industry, solace could be found in the fact that an average of the polls, taken by RealClearPolitics, reflected almost exactly the election result. But individual polls were spread out widely.
4. Such determinations are also complicated by the fact that during some periods, especially the late 19th and early 20th centuries, a fair number of candidates ran on party tickets other than the Republicans and Democrats. To avoid methodological complications, our calculations are based solely on the gains or losses for Republicans and Democrats.
5. The number for the comparisons between 2006 and 2008 are derived from the CNN Election Center. <http://www.cnn.com/ELECTION/2006/> and <http://www.cnn.com/ELECTION/2008/results/main.results/tfvaHH>.
6. Tom Hamburger and Peter Wallsten, *One Party Country: The Republican Plan for Dominance in the 21st Century* (New York: Wiley, 2007); Thomas Edsall, *Building Red America: The New Conservative Coalition and the Drive for Permanent Power* (New York: Basic Books, 2006).

7. As in Table 14.1, changes in Senate party strength were calculated from the official U.S. Senate Web site, <http://www.senate.gov/pagelayout/history/oneitemandteasers/partvdiv.htm>. Changes in House party strength were calculated from <http://www.emailthecongress.com/partv-strength-house.html>; <http://www.emailthecongress.com/partv-strength-house.html>; *Biographical Directory of the U.S. Congress*; Congressional Research Service; Office of the Clerk of the U.S. House of Representatives, http://clerk.house.gov/art_history/house_history/partyDiv.html. Candidates who ran under other labels than Republican or Democrats were left out of the calculations.
8. Thomas Schaller, "The Republican Comeback of 2010," *Salon.com*, December 8, 2008. Accessed at <http://www.salon.com/news/feature/2008/12/08/2010/print.html>: Amy Walter, "Is the Democrats' Momentum Already Sagging?" *National Journal.com*, December 9, 2008.
9. David Mayhew, *Electoral Realignments: A Critique of An American Genre* (New Haven: Yale University Press, 2004); James W. Ceaser and Andrew Busch, *Red Over Blue: The 2008 Elections in American Politics* (Lanham: Roman & Littlefield Publishers, 2005).
10. Harold Meyerson, "A Real Realignment," *The Washington Post*, November 7, 2008, A19.
11. John B. Judis, "America the Liberal," *The New Republic*, November 5, 2008.
12. Exit polls accessed at: <http://www.cnn.com/ELECTION/2008/results/polls/tfUSP00p1>.
13. Remarks on The News Hour with Jim Lehrer, November 5, 2008. See also, Andrew Kohut, "Post-Election Perspectives," 2nd Annual Warren J. Mitofsky Award Dinner on Behalf of the Roper Center Newseum, Washington DC, November 13, 2008.
14. Quoted in Gerald F. Seib, "In Crisis, Opportunity for Obama," *The Wall Street Journal*, November 21, 2008. A video of the interview with Emanuel can be accessed at http://www.realclearpolitics.com/video_log/2008/11/emanuel_says_crisis_is_an_oppo.html.

Reading 15

The Myth of Presidential Mandate

ROBERT A. DAHL

On election night in 1980, the vice president elect enthusiastically informed the country that Ronald Reagan's triumph was

... not simply a mandate for a change but a mandate for peace and freedom; a mandate for prosperity; a mandate for opportunity for all Americans regardless of race, sex, or creed; a mandate for leadership that is both strong and compassionate ... a mandate to make government the servant of the people in the way our founding fathers intended; a mandate for hope; a mandate for hope for the fulfillment of the great dream that President-elect Reagan has worked for all his life.¹

I suppose there are no limits to permissible exaggeration in the elation of victory, especially by a vice president elect. He may therefore be excused, I imagine, for failing to note, as did many others who made comments in a similar vein in the weeks and months that followed, that Reagan's lofty mandate was provided

by 50.9 percent of the voters. A decade later it is much more evident, as it should have been then, that what was widely interpreted as Reagan's mandate, not only by supporters but by opponents, was more myth than reality.

In claiming that the outcome of the election provided a mandate to the president from the American people to bring about the policies, programs, emphases, and new directions uttered during the campaign by the winning candidate and his supporters, the vice president elect was like other commentators echoing a familiar theory.

ORIGIN AND DEVELOPMENT

A history of the theory of the presidential mandate has not been written, and I have no intention of supplying one here. However, if anyone could be said to have created the myth of the presidential mandate, surely it would be Andrew Jackson. Although he never used the word mandate, so far as I know, he was the first American president to claim not only that the president is uniquely representative of all the people, but that his election confers on him a mandate from the people in support of his policy. Jackson's claim was a fateful step in the democratization of the constitutional system of the United States—or rather what I prefer to call the pseudo-democratization of the presidency.

As Leonard White observed, it was Jackson's "settled conviction" that "the President was an immediate and direct representative of the people." Presumably as a result of his defeat in 1824 in both the electoral college and the House of Representatives, in his first presidential message to Congress, in order that "as few impediments as possible should exist to the free operation of the public will," he proposed that the Constitution be amended to provide for the direct election of the president.²

"To the people," he said, "belongs the right of electing their Chief Magistrate: it was never designed that their choice should, in any case, be defeated, either by the intervention of electoral colleges or by . . . the House of Representatives."³

His great issue of policy was the Bank of the United States, which he unwaveringly believed was harmful to the general good. Acting on this conviction, in 1832, he vetoed the bill to renew the bank's charter. Like his predecessors, he justified the veto as a protection against unconstitutional legislation; but unlike his predecessors in their comparatively infrequent use of the veto, he also justified it as a defense of his or his party's policies.

Following his veto of the bank's charter, the bank became the main issue in the presidential election of 1832. As a consequence, Jackson's reelection was widely regarded, even among his opponents (in private, at least), as amounting to "something like a popular ratification" of his policy.⁴ When, in order to speed the demise of the bank, Jackson found it necessary to fire his treasury secretary, he justified his action on the grounds, among others, that "The President is the direct representative of the American people, but the Secretaries are not."⁵

Innovative though it was, Jackson's theory of the presidential mandate was less robust than it was to become in the hands of his successors. In 1848, James Polk explicitly formulated the claim, in a defense of his use of the veto on matters of policy, that as a representative of the people the president was, if not more representative than the Congress, at any rate equally so.

The people, by the constitution, have commanded the President, as much as they have commanded the legislative branch of the Government, to execute their will. . . . The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them. . . . The President is responsible not only to an enlightened public opinion, but to the people of the whole Union, who elected him, as the representatives in the legislative branches . . . are responsible to the people of particular States or districts. . . .⁶

Notice that in Jackson's and Polk's views, the president, both constitutionally and as representative of the people, is on a par with Congress. They did not claim that in either respect the president is superior to Congress. It was Woodrow Wilson who took the further step in the evolution of the theory by asserting that in representing the people the president is not merely equal to Congress but actually superior to it.

evolution of the theory

Earlier Views

Because the theory of the presidential mandate espoused by Jackson and Polk has become an integral part of our present-day conception of the presidency, it may be hard for us to grasp how sharply that notion veered off from the views of the earlier presidents.

As James Ceaser has shown, the Framers designed the presidential election process as a means of improving the chances of electing a *national* figure who would enjoy majority support. They hoped their contrivance would avoid not only the populist competition among candidates dependent on "the popular arts," which they rightly believed would occur if the president were elected by the people, but also what they believed would necessarily be a factional choice if the president were chosen by the Congress, particularly by the House.

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In adopting the solution of an electoral college, however, the Framers seriously underestimated the extent to which the strong impulse toward democratization that was already clearly evident among Americans—particularly among their opponents, the anti-Federalists—would subvert and alter their carefully contrived constitutional structure. Because this is a theme I shall pick up later, I will mention only two such failures that bear closely on the theory of the presidential mandate. First, the Founders did not foresee the development of political parties nor comprehend how a two-party system might achieve their goal of ensuring the election of a figure of national rather than merely local renown. Second, as Ceaser remarks, although the Founders recognized "the need for a popular judgment of the performance of an incumbent" and designed a method for selecting the president that would, as they thought, provide that opportunity, they "did not see elections

as performing the role of instituting decisive changes in policy in response to popular demands.” In short, theory of the presidential mandate not only cannot be found in the Framers’ conception of the Constitution; almost certainly, it violates that conception.

No president prior to Jackson challenged the view that Congress was the legitimate representative of the people. Even Thomas Jefferson, who adeptly employed the emerging role of party leader to gain congressional support for his policies and decisions,

was more Whig than . . . the British Whigs themselves in subordinating [the executive power] to “the supreme legislative power.” . . . The tone of his messages is uniformly deferential to Congress. His first one closes with these words: “Nothing shall be wanting on my part to inform, as far as in my power, the legislative judgment, nor to carry that judgment into faithful execution.”⁷

James Madison, demonstrating that a great constitutional theorist and an adept leader in Congress could be decidedly less than a great president, deferred so greatly to Congress that in his communications to that body, his extreme caution rendered him “almost unintelligible”⁸—a quality one would hardly expect from one who had been a master of lucid exposition at the Constitutional Convention. His successor, James Monroe, was so convinced that Congress should decide domestic issues without presidential influence that throughout the debates in Congress on “the greatest political issue of his day . . . the admission of Missouri and the status of slavery in Louisiana Territory,” he remained utterly silent.⁹

Madison and Monroe serve not as examples of how presidents should behave but as evidence of how early presidents thought they should behave. Considering the constitutional views and the behavior of Jackson’s predecessors, it is not hard to see why his opponents called themselves Whigs in order to emphasize his dereliction from the earlier and presumably constitutionally correct view of the presidency.

Woodrow Wilson

The long and almost unbroken success of mediocrities who succeeded to the presidency between Polk and Wilson for the most part subscribed to the Whig view of the office and seem to have laid no claim to a popular mandate for their policies—when they had any. Even Abraham Lincoln, in justifying the unprecedented scope of presidential power he believed he needed in order to meet secession and civil war, rested his case on constitutional grounds and not as a mandate from the people. Indeed, because he distinctly failed to gain a majority of votes in the election of 1860, any claim to a popular mandate would have been dubious at best. Like Lincoln, Theodore Roosevelt also had a rather unrestricted view of presidential power; he expressed the view then emerging among Progressives that chief executives were also representatives of the people. Yet the stewardship he claimed for the presidency was ostensibly drawn—rather freely drawn, I must say—from the Constitution, not from the mystique of the mandate.

Woodrow Wilson, more as political scientist than as president, brought the mandate theory to what now appears to be its canonical form. His formulation was influenced by his admiration for the British system of cabinet government. In 1879, while still a senior at Princeton, he published an essay recommending the adoption of cabinet government in the United States. He provided little indication as to how this change was to be brought about, however, and soon abandoned the idea without yet having found an alternative solution. Nevertheless, he continued to contrast the American system of congressional government, in which Congress was all-powerful but lacked executive leadership, with British cabinet government, in which Parliament, though all powerful, was firmly led by the prime minister and his cabinet. Because Americans were not likely to adopt the British cabinet system, however, he began to consider the alternative of more powerful presidential leadership. In his *Congressional Government*, published in 1885, he acknowledged that "the representatives of the people are the proper ultimate authority in all matters of government, and that administration is merely the clerical part of government." Congress is "unquestionably, the predominant and controlling force, the center and source of all motive and of all regulative power." Yet a discussion of policy that goes beyond "special pleas for special privilege" is simply impossible in the House, "a disintegrate mass of jarring elements," while the Senate is no more than "a small, select, and leisurely House of Representatives."

By 1908, when *Constitutional Government in the United States* was published, Wilson had arrived at strong presidential leadership as a feasible solution. He faulted the earlier presidents who had adopted the Whig theory of the Constitution.

... [T]he makers of the Constitution were not enacting Whig theory. . . . The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and Congress has not. He has no means of compelling Congress except through public opinion. . . . [T]he early Whig theory of political dynamics . . . is far from being a democratic theory. . . . It is particularly intended to prevent the will of the people as a whole from having at any moment an unobstructed sweep and ascendancy.

And he contrasted the president with Congress in terms that would become commonplace among later generations of commentators, including political scientists:

Members of the House and Senate are representatives of localities, are voted for only by sections of voters, or by local bodies of electors like the members of the state legislatures. There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice. . . . The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. . . . He is the representative of no constituency, but of

the whole people. When he speaks in his true character, he speaks for no special interest. . . . [T]here is but one national voice in the country, and that is the voice of the President.¹⁰

Since Wilson, it has become commonplace for presidents and commentators alike to argue that by virtue of his election the president has received a mandate for his aims and policies from the people of the United States. The myth of the mandate is now a standard weapon in the arsenal of persuasive symbols all presidents exploit. For example, as the Watergate scandals emerged in mid-1973, Patrick Buchanan, then an aide in the Nixon White House, suggested that the president should accuse his accusers of “seeking to destroy the democratic mandate of 1972.” Three weeks later in an address to the country Nixon said:

Last November, the American people were given the clearest choice of this century. Your votes were a mandate, which I accepted, to complete the initiatives we began in my first term and to fulfill the promises I made for my second term.¹¹

If the spurious nature of Nixon’s claim now seems self-evident, the dubious grounds for virtually all such pretensions are perhaps less obvious.

CRITIQUE OF THE THEORY

What does a president’s claim to a mandate amount to? The meaning of the term itself is not altogether clear. Fortunately, however, in his excellent book *Interpreting Elections*, Stanley Kelley has “piece[d] together a coherent statement of the theory.”

Its first element is the belief that elections carry messages about problems, policies, and programs—messages plain to all and specific enough to be directive. . . . Second, the theory holds that certain of these messages must be treated as authoritative commands . . . either to the victorious candidate or to the candidate and his party. . . . To qualify as mandates, messages about policies and programs must reflect the *stable* views both of individual voters and of the electorate. . . . In the electorate as a whole, the numbers of those for or against a policy or program matter. To suggest that a mandate exists for a particular policy is to suggest that more than a bare majority of those voting are agreed upon it. The common view holds that landslide victories are more likely to involve mandates than are narrow ones. . . . The final element of the theory is a negative imperative: Governments should not undertake major innovations in policy or procedure, except in emergencies, unless the electorate has had an opportunity to consider them in an election and thus to express its views.

To bring out the central problems more clearly, let me extract what might be called the primitive theory of the popular presidential mandate. According to this theory, a presidential election can accomplish four things. First, it confers constitutional and legal authority on the victor. Second, at the same time, it also conveys information. At a minimum it reveals the first preferences for president of a plurality of votes. Third, according to the primitive theory, the election, at

least under the conditions Kelley describes, conveys further information: namely that a clear majority of voters prefer the winner, because they prefer his policies and wish him to pursue his policies. Finally, because the president's policies reflect the wishes of a majority of voters, when conflicts over policy arise between president and Congress, the president's policies ought to prevail.

While we can readily accept the first two propositions, the third, which is pivotal to the theory, might be false. But if the third is false, then so is the fourth. So the question arises: Beyond revealing the first preferences of a plurality of voters, do presidential elections also reveal the additional information that a plurality (or a majority) of voters prefer the policies of the winner and wish the winner to pursue those policies?

In appraising the theory, I want to distinguish between two different kinds of criticisms. First, some critics contend that even when the wishes of constituents can be known, they should not be regarded as in any way binding on a legislator. I have in mind, for example, Edmund Burke's famous argument that he would not sacrifice to public opinion his independent judgment of how well a policy would serve his constituents' interests, and the argument suggested by Hanna Pitkin that representatives bound by instructions would be prevented from entering into the compromises that legislation usually requires.

Second, some critics may hold that when the wishes of constituents on matters of policy can be clearly discerned, they ought to be given great and perhaps even decisive weight. But, these critics contend, constituents' wishes usually cannot be known, at least when the constituency is large and diverse, as in presidential elections. In expressing his doubts on the matter in 1913, A. Lawrence Lowell quoted Sir Henry Maine: "The devotee of democracy is much in the same position as the Greeks with their oracles. All agreed that the voice of an oracle was the voice of god, but everybody allowed that when he spoke he was not as intelligible as might be desired."

It is exclusively the second kind of criticism that I want now to consider. Once again I am indebted to Stanley Kelley for his succinct summary of the main criticisms.

Critics allege that 1) some particular claim of a mandate is unsupported by adequate evidence; 2) most claims of mandates are unsupported by adequate evidence; 3) most claims of mandates are politically self-serving; or 4) it is not possible in principle to make a valid claim of a mandate, since it is impossible to sort out voters' intentions.

Kelley goes on to say that while the first three criticisms may well be valid, the fourth has been outdated by the sample survey, which "has again given us the ability to discover the grounds of voters' choices." In effect, then, Kelley rejects the primitive theory and advances the possibility of a more sophisticated mandate theory according to which the information about policies is conveyed not by the election outcome but instead by opinion surveys. Thus the two functions are cleanly split: presidential elections are for electing a president, opinion surveys provide information about the opinions, attitudes, and judgments that account for the outcome.

However, I would propose a fifth proposition, which I believe is also implicit in Kelley's analysis:

5) While it may not be strictly impossible *in principle* to make a reasoned and well-grounded claim to a presidential mandate, to do so *in practice* requires a complex analysis that in the end may not yield much support for presidential claims.

But if we reject the primitive theory of the mandate and adopt the more sophisticated theory, then it follows that prior to the introduction of scientific sample surveys, no president could reasonably have defended his claim to a mandate. To put a precise date on the proposition, let me remind you that the first presidential election in which scientific surveys formed the basis of an extended and systematic analysis was 1940.¹²

I do not mean to say that no election before 1940 now permits us to draw the conclusion that a president's major policies were supported by a substantial majority of the electorate. But I do mean that for most presidential elections before 1940 a valid reconstruction of the policy views of the electorate is impossible or enormously difficult, even with the aid of aggregate data and other indirect indicators of voters' views. When we consider that presidents ordinarily asserted their claims soon after their elections, well before historians and social scientists could have sifted through reams of indirect evidence, then we must conclude that before 1940 no contemporary claim to a presidential mandate could have been supported by the evidence available at the time.

While the absence of surveys undermines presidential claims to a mandate before 1940, the existence of surveys since then would not necessarily have supported such claims. Ignoring all other shortcomings of the early election studies, the analysis of the 1940 election just mentioned was not published until 1948. While that interval between the election and the analysis may have set a record, the systematic analysis of survey evidence that is necessary (though perhaps not sufficient) to interpret what a presidential election means always comes well after presidents and commentators have already told the world, on wholly inadequate evidence, what the election means.¹³ Perhaps the most famous voting study to date, *The American Voter*, which drew primarily on interviews conducted in 1952 and 1956, appeared in 1960.¹⁴ The book by Stanley Kelley that I have drawn from so freely, which interprets the elections of 1964, 1972, and 1980, appeared in 1983.

A backward glance quickly reveals how empty the claims to a presidential mandate have been in recent elections. Take 1960. If more than a bare majority is essential to a mandate, then surely Kennedy could have received no mandate, because he gained less than 50 percent of the total popular vote by the official count—just how much less by the unofficial count varies with the counter. Yet “on the day after election, and every day thereafter,” Theodore Sorenson tells us, “he rejected the argument that the country had given him no mandate. Every election has a winner and a loser, he said in effect. There may be difficulties with the Congress, but a margin of only one vote would still be a mandate.”

By contrast, 1964 was a landslide election, as was 1972. From his analysis, however, Kelley concludes that “Johnson's and Nixon's specific claims of

meaningful mandates do not stand up well when confronted by evidence." To be sure, in both elections some of the major policies of the winners were supported by large majorities among those to whom these issues were salient. Yet "none of these policies was cited by more than 21 percent of respondents as a reason to like Johnson, Nixon, or their parties."

In 1968, Nixon gained office with only 43 percent of the popular vote. No mandate there. Likewise in 1976, Carter won with a bare 50.1 percent. Once again, no mandate there.

When Reagan won in 1980, thanks to the much higher quality of surveys undertaken by the media, a more sophisticated understanding of what that election meant no longer had to depend on the academic analyses that would only follow some years later. Nonetheless, many commentators, bemused as they so often are by the arithmetical peculiarities of the electoral college, immediately proclaimed both a landslide and a mandate for Reagan's policies. What they often failed to note was that Reagan gained just under 51 percent of the popular vote. Despite the claims of the vice president elect, surely we can find no mandate there. Our doubts are strengthened by the fact that in the elections to the House, Democratic candidates won just over 50 percent of the popular vote and a majority of seats. However, they lost control of the Senate. No Democratic mandate there, either.

These clear and immediate signs that the elections of 1980 failed to confer a mandate on the president or his Democratic opponents were, however, largely ignored. For it was so widely asserted as to be commonplace that Reagan's election reflected a profound shift of opinion away from New Deal programs and toward the new conservatism. However, from this analysis of the survey evidence, Kelley concludes that the commitment of voters to candidates was weak; a substantial proportion of Reagan voters were more interested in voting against Carter than for Reagan; and despite claims by journalists and others, the New Deal coalition did not really collapse. Nor was there any profound shift toward conservatism. "The evidence from press surveys . . . contradicts the claims that voters shifted toward conservatism and that this ideological shift elected Reagan." In any case, the relation between ideological location and policy preferences was "of a relatively modest magnitude."

In winning by a landslide of popular votes in 1984, Reagan achieved one prerequisite to a mandate. Yet in that same election, Democratic candidates for the House won 52 percent of the popular votes. Two years earlier, they had won 55 percent of the votes. On the face of it, surely the 1984 elections gave no mandate to Reagan.

Before the end of 1986, when the Democrats had once again won a majority of popular votes in elections to the House and had also regained a majority of seats in the Senate, it should have been clear and it should be even clearer now that the major social and economic policies for which Reagan and his supporters had claimed a mandate have persistently failed to gain majority support. Indeed, the major domestic policies and programs established during the 30 years preceding Reagan in the White House have not been overturned in the grand revolution of policy that his election was

supposed to have ushered in. For eight years, what Reagan and his supporters claimed as a mandate to reverse those policies was regularly rejected by means of the only legitimate and constitutional processes we Americans have for determining what the policies of the United States government should be.

What are we to make of this long history of unsupported claims to a presidential mandate? The myth of the mandate would be less important if it were not one element in the larger process of the pseudo-democratization of the presidency—the creation of a type of chief executive that, in my view, should have no proper place in a democratic republic.

Yet even if we consider it in isolation from the larger development of the presidency, the myth is harmful to American political life. By portraying the president as the only representative of the whole people and Congress as merely representing narrow, special, and parochial interests, the myth of the mandate elevates the president to an exalted position in our constitutional system at the expense of Congress. The myth of the mandate fosters the belief that the particular interests of the diverse human beings who form the citizen body in a large, complex, and pluralistic country like ours constitute no legitimate element in the general good. The myth confers on the aims of the groups who benefit from presidential policies an aura of national interest and public good to which they are no more entitled than the groups whose interests are reflected in the policies that gain support by congressional majorities. Because the myth is almost always employed to support deceptive, misleading, and manipulative interpretations, it is harmful to the political understanding of citizens.

It is, I imagine, now too deeply rooted in American political life and too useful a part of the political arsenal of presidents to be abandoned. Perhaps the most we can hope for is that commentators on public affairs in the media and in academic pursuits will dismiss claims to a presidential mandate with the scorn they usually deserve.

But if a presidential election does not confer a mandate on the victor, what does a presidential election mean, if anything at all? While a presidential election does not confer a popular mandate on the president—nor, for that matter, on congressional majorities—it confers the legitimate authority, right, and opportunity on a president to try to gain the adoption by constitutional means of the policies the president supports. In the same way, elections to Congress confer on a member the authority, right, and opportunity to try to gain the adoption by constitutional means of the policies he or she supports. Each may reasonably contend that a particular policy is in the public good or public interest and, moreover, is supported by a majority of citizens.

I do not say that whatever policy is finally adopted following discussion, debate, and constitutional processes necessarily reflects what a majority of citizens would prefer, or what would be in their interests, or what would be in the public good in any other sense. What I do say is that no elected leader, including the president, is uniquely privileged to say what an election means—nor to claim that the election has conferred on the president a mandate to enact the particular policies the president supports. . . .

ENDNOTES

1. Stanley Kelley, Jr., *Interpreting Elections* (Princeton, NJ: Princeton University Press, 1983), p. 217.
2. Quoted in Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829–1861* (New York: Free Press, 1954), p. 23.
3. Cited in James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton, NJ: Princeton University Press, 1979), p. 160, fn. 58.
4. White, *Jacksonians*, p. 23.
5. *Ibid.*, p. 23.
6. *Ibid.*, p. 24.
7. Edward S. Corwin, *The President: Offices and Powers, 1789–1948*, 3rd ed. (New York: New York University Press, 1948), p. 20.
8. Wilfred E. Binkley, *President and Congress* (New York: Alfred A. Knopf, 1947), p. 56.
9. Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801–1829* (New York: Free Press, 1951), p. 31.
10. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), pp. 67–68, 70, 202–203.
11. Kelley, *Interpreting Elections*, p. 99.
12. Paul F. Lazarsfeld, Bernard Berelson, and Hazel Gaudet, *The People's Choice* (New York: Columbia University Press, 1948).
13. The early election studies are summarized in Bernard R. Berelson and Paul F. Lazarsfeld, *Voting* (Chicago, IL: University of Chicago Press, 1954), p. 331ff.
14. Angus Campbell et al., *The American Voter* (New York: Wiley, 1960).

Reading 16

Changing Tides: Public Opinion, Campaigns, and Governance, 2004–2012

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There is a tide in the affairs of men, Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life Is bound in shallows and in miseries. On such a full
sea are we now afloat, And we must take the current when it serves, Or lose our ventures.

—William Shakespeare, *Julius Caesar*

Public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it.”¹ James Bryce, perhaps the most astute foreign observer of our political life, wrote those words in 1888. Among the “servants” controlled by opinion, Bryce noted, were the president, Congress, and the political parties’ vast machinery.

Electoral contests bear out Bryce’s axiom. Journalists, pundits, and attentive citizens, not to mention candidates and their handlers, understand

the commanding role of public opinion and strive to understand and even to shape it. People's attitudes and habits frame presidential and congressional elections and pose the central dilemmas of strategy and governance. Many of our concerns about contemporary policymaking, in fact, are best understood by posing two of our most enduring questions about U.S. public opinion: First, how are public attitudes distributed among political elites and within the attentive publics? Second, how intensely does each grouping hold those attitudes?

The nation's quadrennial presidential selection processes are long and tortuous—especially compared to the more tidy and compact methods of most of the world's democracies. They command non-stop media coverage. In contrast to these presidential battles, thousands of other electoral contests take place at state and local levels. Most important for national policy are races for seats in the Senate and House of Representatives. Every two years, all House members and a third of all Senators face the voters. These electoral contests can be as complex and time-consuming as the presidential struggles. But they remain a mystery to most citizens. The races normally pass under the radar screens of the national media; even in the localities where they are fought out, they often receive scant coverage.

Presidential and congressional elections ought to be considered together. They reflect public viewpoints—in party choice and policy preferences. These elections—congressional as well as presidential—equally influence the patterns of governance that follow. Examining both sets of elections during the early 2000s illuminates a tidal change that occurred in public attitudes and was reflected in electoral fortunes. Initially, this tide favored the Democrats and eventually swamped the Republicans. After the 2000 elections, Republicans controlled both the White House and Capitol Hill. Six years later, however, a changed electorate ended the GOP's control of the House and Senate. Another two years brought the peak of the Democrats' flood tide: election of the party's presidential nominee and House and Senate gains—even in marginal or Republican-leaning areas. But tides ebb as well as flow. By midyear 2009 the Democrats' surge was halted as the public grew restive, fearful, and skeptical. And so the 2010 midterm elections reinstated GOP control of the House and narrowed the Democrats' margin in the Senate.

THE ELECTIONS OF 2000 AND 2004

The 2000 electoral contest that brought George W. Bush to the White House can best be described as the political equivalent of a tied score resolved by a judicial coin toss. Although the Democrat, Vice President Al Gore, won the popular majority by half a million votes, Bush won the Electoral College vote after a fiercely contested count in the state of Florida. Teams of lawyers for both men battled over the ballots—many of which had been carelessly designed and recorded. There were also reports of instances in which minority voters were discouraged from voting. Eventually, the U.S. Supreme Court seized the case and ruled 5–4 in Bush's favor. Although the decision brought a sigh of relief from Republicans (who as a result controlled all three branches of the federal government), the ruling received mostly negative reviews from

legal scholars because it seemed to underscore the increasingly political (and even partisan) divisions among the justices. As one judicial expert explained, “those five votes should not have counted as much as they did, particularly since we know that too many of our justices cannot resist the temptation to engage in unprincipled partisan decision-making.”²

The 2004 presidential election—between incumbent President George W. Bush and Massachusetts Senator John F. Kerry—was always viewed as “too close to call.” Victory was well within the grasp of either candidate. When the actual votes were tallied, Bush received 50.7 percent to Kerry’s 48.3 percent. The Electoral College margin was a bit wider: Bush, 286 (53 percent) to Kerry’s 252 (47 percent). It was an uncontested but narrow victory for the incumbent—the smallest margin of any reelected president in recent memory.

PARTISAN LOYALTIES AND ISSUE PREFERENCES

Potential voters in 2004 were closely divided yet farther apart in their partisan loyalties than at any time since the Vietnam War era. The Pew Research Center reported that partisan identification was split fairly evenly three ways: Democrats claimed 33 percent, Republicans 31 percent, and Independents 36 percent. Such partisan parity was judged “a relatively new phenomenon” in American politics. From the 1930s through 2001, Democrats led the GOP in party identification (with a few short-lived exceptions). But the terrorist attacks of September 2001 brought a major Republican surge; “the shift [was] seen in most major demographic and social groups in the population, and [was] fairly consistent in size.” Thus the 2004 playing field was virtually level.

Moreover, Pew’s longitudinal measures (which began in 1987) of political, economic, and social values showed that

political polarization is now as great as it was prior to the 1994 midterm elections that ended four decades of Democratic control of Congress. But now, unlike then, Republicans and Democrats have become more intense in their political beliefs.³

So the agreed-upon story line for the 2004 campaign and election was the deep rift within the U.S. public concerning pressing national concerns—the Iraq war and the state of the economy, not to mention such hot-button social issues as abortion, gay marriage and stem-cell research. Such intense divisions of opinion are found mainly among politically active citizens: the same people who are most likely to contribute time and money to parties and candidates—and, of course, to turn out on election day.

The larger public—which includes apathetic or occasional voters—clusters toward the center of the ideological spectrum. The National Election Survey (NES) reported that, as in prior years, respondents in 2004 basically conformed to a normal bell-shaped curve, which means that the populace contained a plurality of moderates—at least four out of every ten citizens.⁴ The networks’ exit polls of voters found also that 45 percent of voters pegged themselves as moderates while 34 percent called themselves conservatives and 21 percent said they were liberals.

So-called “social issues”—such as abortion, stem-cell research, and gay marriage—were much mentioned in 2004, but had little overall impact. But ironically, the gay marriage issue was probably decisive in the final Electoral College tally. Citizens at that time rejected the notion of same-sex marriage by a margin of 57 to 32 percent; but the issue was most salient for opponents—especially GOP stalwarts, religious conservatives, and older voters. Prodded by White House strategists, anti-gay groups in eleven states sponsored constitutional referendums defining marriage as solely the union of a man and a woman. Anti-gay sentiment swelled the ranks of voters in those states, especially in the pivotal states of Michigan, Oregon, and Ohio. Kerry narrowly won the first two states, but Bush took Ohio in a close contest marred by disputed voting procedures and tallies. So Ohio became the 2004 tie-breaking equivalent of Florida four years earlier. “That was probably the deciding factor in the race,” boasted the head of a “pro-family” lobby—and he may well have been right.

THE CANDIDATES' PERSONAL QUALITIES

A final variable in the voting equation is the candidates themselves: their issue positions, their personalities, their character, their leadership, and their ways of connecting with the electorate. Bush's public approval was already trending downward as the 2004 ballots were cast: A *Washington Post*/ABC News poll in January 2004 found that, with the conspicuous exceptions of the fight against terrorism and the Iraqi venture, the public believed the Democrats would do a better job on a wide range of domestic issues—such as the economy, health care, Medicare, the budget deficit, immigration, and taxes. On the question of who was most trusted to handle the nation's leading problems, Bush enjoyed a statistical one-point advantage—down from 18 points the year before.

Likely 2004 voters saw different qualities in the two candidates: Kerry's supporters connected with his stands on issues, whereas Bush's followers discerned character and leadership. A plurality of potential voters favored Kerry rather than Bush to handle leading domestic issues, even contentious social questions. But despite his lackluster job ratings, Bush won the image contest: He “kept the nation safe from terrorism,” and he came across as the more likeable, approachable person—a 20-percent advantage over his challenger.

CAMPAIGNING: CORE VOTERS VERSUS SWING VOTERS

Presidential campaigns must mobilize the parties' most loyal followers, the “core voters.” These people are more attuned to the parties' objectives and most likely to act upon their convictions—to volunteer, to donate money, and to turn out on election day. Many campaign professionals and political scientists thus advise that campaigners work primarily to raise the enthusiasm and the turnout of such loyalists.

In presidential elections, however, campaign managers cannot afford to ignore the uncommitted middle of the ideological spectrum. In June 2004 the Pew Research Center reported that about one fifth of the “certain voters”

remained undecided about their choice, a segment of the electorate large enough to affect the election's outcome. But winning over such voters presents a twofold challenge: They are more likely to be swayed by candidates than by the parties and their programs; and of course they are less likely than dedicated partisans to show up on election day.

President Bush's handlers opted in 2004 to target core voters over swing voters, even in states considered in play by both camps. So the president bettered his 2000 performance among many GOP-leaning groups—including men, whites, older voters, married people, white Protestants, Catholics, suburban dwellers, affluent voters, and those with less formal education. He even cut Kerry's share among traditionally Democratic groups: for example, Blacks, Hispanics, Jews, and city dwellers. *Los Angeles Times* analyst Ronald Brownstein concluded that Bush "triumphed more by solidifying than expanding his coalition—more by deepening than broadening his support. . . . The conservative surge to the polls consolidated the Republican hold on the portions of the country where the party was already strongest."⁵ Exit polls found that the president had actually *lost* ground among independent voters between 2000 and 2004.

Democratic campaigners countered with efforts to register thousands of new voters, mainly young people. This no doubt paid off. New voters and those 18 to 29 years of age were among the strongest Kerry supporters. Within the party's base, also, there were some bright spots: Kerry improved upon Gore's performance among ideological liberals and moderates, small towns, rural Democrats, highly educated voters, and those from the economic underclass. Among most other Democratic-leaning groupings, however, Kerry fell behind Gore's margins of 2000.

President Bush's image as a wartime leader won him just enough centrist voters to win—even though many of them disagreed with his policies. But his reelection did nothing to heal the sharp divisions among political activists. After the balloting, 72 percent of the voters said the nation was more deeply divided on major issues than in recent years—up from 64 percent who felt that way four years earlier. During his second term, therefore, he and his party were faced with the dilemma that his re-election failed to resolve: How to recapture the political center while retaining the party's ideological core supporters.

Bush's chief strategist, Karl Rove, proclaimed that a permanent Republican majority had arrived. But for a president whose fortunes had been carried aloft in the aftermath of the September 2001 terrorist attacks, the closeness of his reelection might well have signaled mounting troubles during his second four years.

THE 2004 CONGRESSIONAL RACES

As with most congressional elections, the overall outcomes in 2004 were mostly determined months and even years before the actual balloting. A large majority of House seats, and many Senate seats, are safe for one party or the other; they are even safer if they are held by incumbents seeking reelection. Fewer than one in ten House districts and no more than a third of Senate seats to be voted upon were truly in play (that is, about one-ninth of all Senate seats). With a

three-seat Senate margin and a 24-seat House margin during the 108th Congress (2003–2005), the Republicans enjoyed a statistical head start going into the 2004 campaign season.

The four Capitol Hill parties (that is, the House and Senate Democratic and Republican campaign committees) nowadays play an active role in recruiting, supporting, and even funding House and Senate candidates.⁶ First, the parties' successes or failures over the recruitment season—starting just as soon as the previous elections' ballots are counted and extending to state and district primaries—determine whether quality candidates (mostly incumbents) or long-shot contenders were on the ballot. Incumbents begin with large advantages—in visibility, in fundraising, and in records of service to their constituents. In many cases, House districts are artfully designed to protect their careers. Incumbents (especially if recently elected) who face closely contested races are provided by their parties with extra resources: for example, a prominent committee assignment, a role in passing popular bills, or extra campaign funds. To retain their control of the two chambers, Republicans (aided by the Bush White House) and Democrats therefore worked first to dissuade their incumbents from retiring.

The party committees then directed their efforts toward seats that were open or held by retiring or vulnerable members: recruiting promising candidates, “clearing the field” by elbowing rivals aside to forestall divisive primaries, and channeling resources to campaigns. Democrats pursued a similar course. For 2004, then, the two parties fought over a small minority of congressional races.

Party leaders are pragmatists, above all identifying and supporting winners. Thus Democrats court anti-abortion or pro-gun figures in swing states or districts; the GOP leans toward moderates over extremists for such races. Both parties were able in 2004 to recruit big-name contenders and other quality candidates. Sometimes controversial figures were shunned—for example, Rep. Katherine Harris, the presumed GOP front-runner for Florida's open Senate seat, was persuaded to postpone her bid because as Florida's secretary of state she had been at the vortex of the 2000 presidential election controversy. The ultra-right Club for Growth promoted conservative candidates in several contests—backing a Colorado Senate candidate who ultimately lost the general election, and spending more than \$2 million against moderate Sen. Arlen Specter—who narrowly won nomination with help from the White House and the party establishment. (Six years later, Specter switched to the Democrats to avoid overwhelming right-wing opposition in the state's GOP primary.)

Not all nationally sponsored choices win nomination. Although 2004 was a good year for Republicans, they suffered a major embarrassment in Illinois' open Senate seat. Their vulnerable incumbent having retired, their wealthy front-runner withdrew in the wake of a marital scandal; and several prominent substitutes (especially Chicago Bears' legendary linebacker Dick Butkus) shunned the race. Lacking a credible candidate, the party finally had to stand aside for a self-promoting nominee, an out-of-state ideologue too extreme for the state. So the young Democratic contender walked to victory, winning seven out of ten general election votes. He was Barack Obama, only the third black senator to be elected in a hundred years.

As in presidential elections, party identification is the most powerful factor at the congressional balloting—even more so, because most congressional contenders are less well known than presidential candidates. This is especially true of non-incumbents, who normally lack the visibility of sitting House and Senate members. Lacking deep information about the candidates, voters use party affiliation as a short cut to reaching their decisions. Issue preferences also play a role: candidates and their party backers stress them, but again citizens tend to subsume their preferences to partisanship.

The 2004 elections rewarded Republicans with four more Senate seats and three more House seats, giving them a 55-45 Senate majority (counting one Independent with the Democrats) and a 232-202 margin in the House. This was probably the result of high Republican turnout in states already in the party's fold. Most spectacular was South Dakota Republican John Thune's narrow victory (by 1.2 percentage points) over Senate Majority Leader Tom Daschle—a race that drew national attention and lavish funding from a variety of interest groups. In this normally Republican state, Thune cast the race as a referendum on Daschle's role in thwarting President Bush's programs.

Regionally, the South and Great Plains and Rocky Mountain states—all but one of which went for Bush that year—formed the backbone of the congressional GOP. In the eleven southern states, the party claimed nearly two-thirds of the House seats and all but five senators. In the plains and mountain states the party boasted two-thirds of the representatives and nearly three-quarters of the senators. The upper Midwest—from Ohio to Wisconsin—remained competitive. Democrats were strongest at the edges of the national map—the two coasts along with the upper Midwest. The eleven states of the eastern “Amtrak corridor,” from Boston to the nation's capital, were increasingly Democratic. In those states (all in Kerry's column) the party claimed two-thirds of the House seats and a nine-seat Senate margin. Similarly, the left-hand coast—the four Pacific-rim states (excluding Alaska), again all in the Democratic presidential column in 2000 and 2004—had a Democratic margin of twenty House seats and seven out of eight Senate seats. In these areas the Democrats had about run out of future gains; to expand their holdings, the party needed to find new openings in Midwestern, Mountain, and Southern states.

THE 2006 ELECTORAL TURNAROUND

Two years later, the two parties faced a vastly altered political landscape. These were midterm elections, waged without the president at the top of the ticket. Historically, the president's party typically loses ground, with the balloting serving as a kind of referendum on the administration's policies (1998 and 2002 were rare exceptions). Following a brief post-election surge, President Bush's public support resumed its downward path: citizens were equally divided on his job performance by April 2005, but by fall a majority of respondents judged him negatively. By the time of the 2006 elections, only 38 percent of the general public approved of Bush's presidency, whereas 53 percent disapproved.⁷ The president's eroding public support weakened his leverage on Capitol Hill;

and his overall strategy of “feeding the [GOP] base” limited his policy options. His most fervent and time-consuming crusade—Social Security reform—went nowhere; even immigration reform, his one major effort to expand his coalition (to Latinos), was thwarted because the bill that emerged tilted too heavily toward the conservatives’ goal of stricter border protections. Ron Brownstein concluded: “[M]ostly Bush spent his second term in retreat.”⁸

Conversely, Democratic prospects visibly brightened. The party rose to a double-digit advantage, with a lead of 49 to 38 percent among registered voters, and 50 to 39 percent among likely voters. The Democrats’ public image was on the upswing (53 percent viewed the party favorably, compared to 41 percent for the GOP); and the party was more trusted to handle most issues (with the exception of terrorism and possibly immigration). The Democrats’ advantage extended to contested House districts and even GOP strongholds.⁹ Not that people were thrilled with either Capitol Hill party; but as the ruling party, Republicans bore the brunt of the disaffection.

Both parties struggled to gain the edge in recruiting candidates. Given the state of public opinion, Democrats had little trouble finding quality candidates. Successful Senate contenders included Pennsylvania’s state treasurer (Bob Casey, an anti-abortion moderate and son of a revered late ex-governor); Montana’s Jon Tester, a farmer and state senate president; and Virginia’s Jim Webb, a Marine combat veteran and former Navy secretary in the Reagan administration who shed his GOP identity because of the Iraq war. Successful House candidates included two former House members, eight state senators, six city or county officials, and at least ten former candidates for state or federal office.

Republicans were hard-pressed to find viable replacements for several scandal-ridden House members who withdrew at the last moment. They were also unable to find top-flight challengers to Democratic incumbents—most notably, New York Sen. Hillary Rodham Clinton, who won by 1.5 million votes. In Florida, Rep. Harris—pushed aside two years earlier—could not be denied the nomination this time around; but she lost to Democratic incumbent Bill Nelson by more than a million votes.

The parties’ various campaign committees raised some \$848 million to underwrite their efforts and disperse to candidates. Republican committees, traditionally successful fundraisers, raised about 55 percent of this money. Surprisingly, though, the Democratic Senate Campaign Committee, chaired by New York’s Charles E. Schumer, outspent its Republican counterpart by some \$32 million. In view of the razor-thin margins that marked several Senate contests, the GOP campaign committee’s rare funding shortfall must be judged a miscalculation.

The elections gave Democrats control of both chambers: a 233-202 margin in the House, and a nominal 51-49 edge in the Senate (actually a 49-49 tie, but two Independents who caucus with the Democrats enabled them to organize the chamber). California’s Rep. Nancy Pelosi became history’s first woman Speaker, while Sen. Harry Reid of Nevada moved from Minority to Majority Floor Leader.

Electoral outcomes are shaped both by local and national forces. Top-down trends seemed to prevail in 2006, led by the Iraq war (25 percent of citizens counted it the “most important problem”) followed by terrorism, the economy,

and energy costs. Anti-incumbent sentiment was another factor: nearly half of those surveyed said they did not want “most incumbents” reelected. Ethical issues (Republicans’ scandals seemed more visible) fed popular unrest.

The Democrats’ geographic reach extended beyond the party’s usual strongholds to include some traditionally Republican battlegrounds—the Virginia and Montana Senate victories, for example. While the party’s two Hill committees continued to focus their attention on open or contested seats, Democratic National Committee chair Howard Dean was launching a “50-state strategy”—the goal of which was to build the party’s strength nationwide by reaching beyond the 18 to 20 “blue” [Democratic] states—not just for presidential and congressional races, but also for local and state offices, where potential candidates for federal office gain experience and visibility. Dean’s broad strategy clashed with the narrower focus of the congressional committees; but he proved himself to be “a pragmatic and visionary political field general,” whose initiatives reached fruition two years later.¹⁰

THE 2008 PRESIDENTIAL ELECTION: “THE BEST CAMPAIGN”

The 2008 presidential election drew near-record levels of interest and involvement. Not in nearly half a century—the Kennedy-Nixon race of 1960—had so many Americans recognized the importance of the contest, paid such rapt attention to the process, volunteered to participate, and cast their votes. The contest also engaged the attention—occasionally awestruck, more often befuddled—of onlookers in Europe, the South Pacific, Africa, and elsewhere around the globe. It had all the drama and uncertainty of a long-running athletic rivalry. “What a show it’s been!” enthused David S. Broder, a revered political analyst who proclaimed it “the best campaign I’ve ever covered.”¹¹

Leading up to the 2008 balloting, the citizens’ mood was even bleaker than two years previously. Large majorities believed the nation was headed “on the wrong track”: a compilation of national surveys found some 70 percent felt this way in early 2008, and by election day that figure had swelled to almost 90 percent.¹² The economic crisis of autumn 2008—the largest downturn since the Great Depression—further eroded public confidence in the nation’s wellbeing. Just before the election, the Conference Board’s Consumer Confidence Index fell to an all-time low.¹³

Citizens tended to blame the president and the Republican party for the nation’s woes: Bush’s positive job ratings tumbled to 29 percent just before the election.¹⁴ And the GOP’s deficit in party identification—a mere 2 percent in 2004—grew to 12 percent. Democratic party identifiers accounted for nearly four in ten voters (38 percent), according to Pew Center surveys.¹⁵ And Independents (unreliable as they may be) were expected to favor Democratic candidates by at least a 60-40 ratio.

The Democratic tide occurred among voters of all ages; but the greatest gains were among younger voters. Democrats outnumbered Republicans by

nearly a two-to-one margin (61 to 32 percent) among voters aged 18 to 29.¹⁶ The party's strength extended beyond traditional Democratic states and into pivotal GOP-leaning states. They claimed margins in such battleground states as Colorado, Florida, Indiana, Iowa, Missouri, North Carolina, and Virginia (among these, only Missouri voted—narrowly—for the GOP's presidential candidate).

The public's policy attitudes and values, moreover, seemed to drift toward long-standing Democratic party positions. Twenty years after launching its surveys of Americans' political values in 1987, the Pew Center found the policy landscape more favorable to Democrats: "[i]ncreased public support for the social safety net, signs of growing public concern about income inequality, and a diminished appetite for assertive national security policies."¹⁷ The surveys found more approval of government programs for the disadvantaged, less social conservatism, less rigid religious beliefs, and more tolerance for racial, cultural, and sexual minorities. Younger people seemed to be leading the way to more liberal social and political values.

Massive registration drives by the parties and their allied groups in the run-up to the election enlarged the number of potential voters. Again, Democrats ran ahead of the pack: traditionally "blue" Democratic states became more so, and many "red" GOP states morphed to pink or purple. An attitudinal measure closer to actual voting decisions is the surveys' "general ballot question": If the election were held today, which party's candidate would they choose? On the eve of the election, the registered voters polled by Gallup favored the Democrats, 54 to 30 percent.¹⁸

THE CANDIDATES AND THEIR CAMPAIGNS

The nominating phase of presidential elections—far more protracted than the general election phase—is dizzyingly complex and subject to quadrennial change. The basic pattern is laid down by the national parties, but the precise rules—for example, who can participate, and how delegates are selected—vary from state to state, and between the parties within each state. From January 2007 to June 2008, this was the most fascinating part of the process. While the nomination contests are somewhat tangential to our central narrative, a few general elements should be mentioned—especially because they laid the groundwork for Sen. Obama's eventual victory.

Delegates to the national nominating conventions are selected, state-by-state, by caucuses, conventions, or primaries, or some combination of the three. Broadly speaking, GOP state contests proceed on a *winner-take-all* (or at least winner-take-most) basis. But the Democrats' rules, at least since the McGovern-Fraser Commission reforms of 1970, tilt decidedly toward *proportional representation*, also encouraging states to choose their delegates through primary elections.¹⁹ Serious presidential contenders (or rather, their managers) are thus well advised to study procedures adopted by all the states and territories, and to organize their efforts accordingly. The California Democratic Party, for example, published in July 2007 a 30-page handbook detailing procedures for selecting the state's 503 delegates and alternates, including

a list of affirmative action goals.²⁰ Of these, 133 would be selected outside the state-wide primary—automatically seating the Democrats’ federal officeholders and state party officials.

Recent presidential nominees have tended to be *front-runners* “established either by lining up endorsements and contributions before the voting started or by performing well in the early contests.”²¹ Such advantages can provide enough “momentum” to propel them to the nomination. This pattern applied not only to such Republicans as Robert Dole (1996) and George W. Bush (2000), but also to such Democrats as Jimmy Carter (1976), Walter Mondale (1984), Bill Clinton (1992), and John Kerry (2004).

RACES FOR THE PARTIES’ NOMINATIONS

Arizona’s Sen. John McCain, considered the 2008 GOP front-runner, went on to win his party’s nomination—overcoming several strong rivals and a financial meltdown within his campaign in summer 2007. His delegate count piled up as a result of virtually unbroken victories in state contests. Indeed, McCain had amassed enough delegates for the nomination by the time his last serious rival (former Arkansas Governor Mike Huckabee) withdrew in early March—only a month after the first-in-the-nation Iowa caucuses and with 11 states yet to vote.

The Democratic race, in contrast, turned into a close, bitter five-month struggle between New York Sen. Clinton and freshman Illinois Sen. Barack Obama. Clinton won her front-runner status through media visibility, poll numbers, and support from notable Democrats (many of them veterans of Bill Clinton’s presidency). Obama, however, inspired audiences with his theme of “change” and led one of history’s most brilliantly executed campaigns. The core insight of his effort was that, under the party’s proportional representation rule, the nomination would hinge on gaining delegates, not just on statewide wins or losses. Winning a state’s “beauty contest” captures media attention and assures a certain majority of delegates; but even a loss can still reap a sizeable share of delegates. The news media, for example, reported that by winning the California Democratic primary Sen. Clinton “captured the biggest prize of all.” In fact, her margin—51 to 48 percent—awarded her only 55 percent of the 370 delegates at stake (proportionately allocated statewide and within congressional districts). So Obama’s statewide “defeat” actually netted him 45 percent of California’s delegates.²² As for those twelve states that chose delegates by caucuses (some in combination with primaries), Obama reaped a rich harvest—amounting to nearly 20 percent of his pledged delegates. “His average margin of victory in those contests was 34 percent. He won almost twice as many delegates in caucuses as did Clinton.”²³

Sen. Clinton’s campaign—led by many of her husband’s campaign veterans—was outmatched, outmaneuvered, and outspent. Her campaign resources were spent in winning statewide races—according to the prevailing front-runner-momentum model—rather than concentrating on actual delegate selection procedures. (Perhaps the campaign’s managers were simply ill-informed: her chief strategist reportedly declared in a campaign meeting that a California victory would give her all the delegates.²⁴)

Obama raised a record three-quarters of a billion dollars for his 2008 campaign—two-thirds of which came from on-line contributions. Of the total, Obama allocated \$414 million to his nomination campaign. (Sen. Clinton raised a total of \$224 million, and Sen. McCain \$221 million.) For the first time since the advent of the presidential public financing system, Obama opted to rely on private donations and decline public funds for the nomination (he collected eight times more than the federal spending limit) as well as the general election. Such commanding financial resources enabled him to open more local offices and send more workers into communities across the country—even in Republican-leaning states—than any other contender.

OBAMA VERSUS MCCAIN

Compared with the exciting Democratic nomination battle, the general election contest was mostly a letdown. One exception was McCain's vice presidential choice. Rejecting several candidates he might have preferred, he chose instead first-term Alaska Governor Sarah Palin. This surprise choice excited GOP stalwarts, but Democrats and Independents (64 percent of whom thought her unqualified) were repelled by her inexperience and her weak grasp of national issues. Despite an early bounce in the polls, the Palin choice ultimately harmed McCain's cause: "She may have helped shore up the Republican base, but she made it far more difficult for McCain to broaden his appeal," two seasoned reporters concluded.²⁵ Obama's vice-presidential choice, six-term Delaware Sen. Joseph E. Biden, was generally applauded (two-thirds of voters believed Biden was qualified to step into the presidency, whereas 60 percent thought Palin was unqualified).

The decisive blow to McCain came when the nation's deteriorating economy was jolted by a Wall Street crisis beginning on September 15, when the stock-trading company Lehman Brothers failed. At a Florida rally that day, McCain repeated his often-expressed claim that "the fundamentals of our economy are strong." Obama quickly mocked this as evidence that his opponent, along with Bush and the rest of the GOP, were clueless about the economy. McCain tried several tactics to recover his footing—suspending his campaign briefly to return to Washington to help craft a financial bailout package, and then introducing the nation to "Joe the Plumber," a working-class hero who supported him. Nothing worked. Obama's poll numbers climbed: Three weeks before the balloting, a *Los Angeles Times*/Bloomberg poll found Obama had expanded his lead from four to nine points.

Obama's November 4 victory was a broad-based, clear-cut win, though no landslide.²⁶ Obama commanded the popular-vote majority by a 6.3-point margin (52.5 percent to McCain's 46.2 percent). He also gained more than two-thirds of the Electoral College votes (365 to 173)—far below the land-slides of Franklin Roosevelt, Eisenhower, or Reagan, but well ahead of Truman, Kennedy, and Carter—not to mention both of George W. Bush's elections.

Obama's election fulfilled the campaign goal of reaching beyond the reliably Democratic states: his edge in such contested states as Colorado, Florida,

Indiana, Iowa, Nevada, New Hampshire, North Carolina, Ohio, and Virginia meant that the election did not hinge upon just one or two pivotal states. And he had improved the party's vote among young people, women, Blacks and Hispanics, city and suburban residents, and political moderates and Independents (not to mention liberals). Nonetheless, given the election's context—political, social, and finally economic—its result was highly predictable. Two seasoned observers put it this way:

In many ways, the actual results . . . were as expected; they were quite unremarkable if one understood how the fundamentals of the political landscape so favored the Democrats throughout all of 2008. Obama's victory margin was what it should have been for a generic Democrat against a generic Republican.²⁷

THE CONGRESSIONAL RACES

DNC Chair Howard Dean's 50-state strategy harmonized in 2008 not only with Sen. Obama's outreach to traditional GOP strongholds, but also (unlike 2006) with the Capitol Hill campaign committees' stepped-up recruiting and financing efforts.

The Republicans' outlook looked bleak from the very outset of the 2008 congressional election cycle (that is, as soon as the 2006 ballots had been counted). The GOP had lost its majority status after a dozen years—a deprivation felt especially by House members. Of course, the GOP was not without defensive weapons: the Senate's 60-vote barrier to close filibusters and President Bush's veto pen. But future prospects looked grim, given the declining popularity of the party and its president.

Many Republicans therefore decided that 2008 was a good time to retire. All 6 Senate retirees were Republicans, as were all but 3 of the 26 House retirees. Three of the Senate GOP retirees were replaced by Democrats, as were 11 House retirees. Some newly reelected members—including former House Speaker Dennis Hastert (Ill.) and former Senate Majority Leader Trent Lott (Miss.)—simply resigned without bothering to serve out their terms.

Even though the outcome fell short of a landslide, Democrats were able to expand their Capitol Hill majorities beyond their 2006 levels. The party gained 24 seats in the House, giving them a 257–178 majority—only two votes shy of the 259 seats the party held before the GOP captured Congress in 1995. More than a dozen House Republicans were defeated, including the GOP's only remaining New England member—Christopher Shays of Connecticut, a moderate. In New York State, only one Republican was left standing.

As for the Senate, the Democrats just barely attained the supposedly filibuster-proof 60-seat majority—counting the two Independents who caucused with the Democrats (Bernard Sanders of Vermont and Joseph I. Lieberman of Connecticut), one party-switcher (Sen. Arlen Specter of Pennsylvania), and Sen. Al Franken, belatedly named winner of Minnesota's razor-tight contest (only 325 votes out of nearly 3 million cast). The death of Sen. Edward M. Kennedy later in the year (moderate Republican state senator Scott Brown won his vacant seat) not only set back the Democratic leaders' quest for the

60 votes they would need to curb close debates, but was also an incalculable loss of his legendary tactical and bargaining skills.

THE DEMOCRATS' EBB TIDE

From the start, President Obama and his party faced a “perfect storm” of domestic and global policy crises—including the most acute economic downturn since the 1930s; the perilous state of Wall Street firms; the implosion of a long-running home mortgage bubble; the near-meltdown of the nation’s auto manufacturers; numerous unmet domestic needs (for example, in education, research, and infrastructure); soaring health-care costs compared with lagging health results; long-term wars in Iraq and Afghanistan; and natural and human disasters in Africa, the Middle East and elsewhere. No matter that the president inherited most of these problems from the Bush administration—especially the two wars and a costly Medicare drug program, plus tax cuts that yielded insufficient revenue to pay for such endeavors. Campaigning against Bush’s record to gain office, Obama promised “hope” and “change.” Ironically, as soon as he and the Democrats gained control, *they* owned these problems and would be held accountable for failing to resolve them.

In crafting legislative responses to such contentious issues, Democratic majorities—especially the 60 votes needed to shut down Senate filibusters—were by no means guaranteed. The irony of the party’s House and Senate successes was that by giving it a more diverse membership it also fostered greater resistance to the party’s traditional progressive goals. Democratic victories in 2006 and 2008 were achieved in large part by overthrowing Republicans in moderate and even conservative states and districts. These Democratic newcomers naturally worried about holding their seats, which meant appealing to moderate voters. (The House “Blue Dog” group, composed of moderate to conservative Democrats, had 52 members in the 111th Congress.) In both chambers, such members pushed back against activist policy initiatives, such as large financial bailout packages and innovative health care plans.

Constituents—whose generic call for “change” had put the Democrats in power—seemed unimpressed with the legislative products that the party was able to achieve—including an economic stimulus package, new financial regulations, bailouts for key industries, temporary help for car buyers and mortgage holders, and the Affordable Care Act of 2010. Seven months into the Obama administration, surveys recorded doubts and worries about the rapid pace of the Democrats’ ambitious policy agenda, along with generalized support for “reform.” Only 27 percent of citizens said that Obama’s policies had improved the economic picture (about a third thought the policies had made conditions worse; another third said they had no effect). Public trust and confidence in government actions plummeted to a low point, as reported by the Pew Research Center in the spring of 2010.²⁸

On the eve of the 2010 elections, the Pew Center reported that people were pessimistic about the U.S. economy—hardly a surprising finding. Fully 92 percent of the interviewees said that the nation’s economy was only fair

or poor.²⁹ More than four out of ten Americans reported facing severe financial problems.

Economic worries fostered a rising pessimism about the government's capacity to cope with such issues. A total of 77 percent of those interviewed said they were frustrated or even angry with the federal government. President Obama's approval numbers fell below 50 percent, even below Bush's ratings in 2004. Even worse was the judgment about Congress: only 25 percent of those surveyed approved of its stewardship. Nor were the political parties to be trusted: The Democrats' rating was 38 percent and the Republicans' 37 percent.³⁰

The 2010 midterm elections thus challenged the majority party. "Democrats no longer have the momentum they once possessed," independent campaign analyst Stuart Rothenberg declared. "[T]he landscape has shifted again, this time improving significantly for Republicans."³¹ Another nonpartisan commentator, Charlie Cook, observed that Democratic fortunes had "slipped completely out of control" and speculated that the party would risk losing 20 or more House seats in 2010.³²

Meanwhile, the Republican party's internal dynamics were shifting. The party increasingly moved toward the right end of the ideological spectrum; very few of the old GOP moderates—now scorned as "RINOs" (Republicans in name only)—remained in the House or Senate. Now a grass-roots movement, the newly-sprung "Tea Party," pursued an even more radical agenda for shrinking the size and cost of government. The Tea Partiers complemented Republican policies; but their positions were more extreme than those of the party's average lawmakers.

THE DEMOCRATS' 2010 "PASTING"

Signs of the Democrats' mounting fears could be seen in the retirement decisions of sitting House members. In 2008 it was Republican members who raced for the doors; now it was Democrats, especially those from swing districts. Eleven House Democrats chose to retire rather than face the odds—including 21-term Appropriations chair Dave Obey of Wisconsin along with such swing-district members as Dennis Moore of Kansas, Bart Stupak of Michigan, and Brian Baird of Washington. All of these districts posted GOP wins in November 2010.

This time the GOP's Hill committees were prepared to recruit and help their candidates. The chair of the House GOP's campaign committee, Jeff Sessions of Texas, launched a "Patriot" program to aid some 30 to 50 Republicans who were considered vulnerable in the 2010 election cycle. It was expressly modeled after the Democrats' "Frontline" program, which began with the 2004 cycle.³³ Also identified were quality candidates throughout the country, the most promising of whom were dubbed "Young Guns." Money and campaign aids were showered on these recruits.

In light of the grim economic picture and doubts about the president's ambitious programs, Republicans enjoyed a banner year in recruiting quality candidates. Indiana's Senate candidate was Dan Coats, who earlier had served ten years as the state's junior senator before he decided to retire in 1998 rather than run

against Democrat Evan Bayh. Ironically, in 2010 the seat became vacant when Bayh decided to retire—after having initially prepared for the campaign. In neighboring Ohio the GOP candidate for another open seat was Rob Portman, a fiscal conservative who earned bipartisan respect as a 12-year House veteran and then two years directing George W. Bush's Office of Management and Budget.

Although a majority of the 2010 candidates were vetted by local GOP organizations, most of them tried to link their messages to Tea Party demands. In some instances, Tea Party loyalists prevailed over the local party's favorites. The most conspicuous example occurred in Kentucky, where independent Rand Paul—a loyalist in the mold of his libertarian father, Rep. Ron Paul (R-Texas)—won the Senate nomination over Kentucky Secretary of State Trey Grayson, who had the support of Senate Minority Leader Mitch McConnell and the rest of the state's GOP establishment.

The 2010 returns amounted to a huge Republican tidal wave—a gain of 64 House members. The GOP's 242 representatives formed the party's largest House caucus since the 80th Congress (1947–1949). It was also the greatest House setback for a presidential party since the Roosevelt era (the average midterm loss for presidential parties is 27.8 House seats and 3.6 Senate seats).³⁴ Meanwhile, the number of “Blue Dog” Democrats was cut in half. For the Senate, Republicans gained seven seats for a 53–47 split (including two Independents who caucus with the Democrats). This weakened the Democrats' control of the body by moving the 60-vote margin for closing debate even farther from their leaders' grasp. And extended debate, or filibusters—once used only for major issues—are now invoked on the most routine or trivial questions. President Obama conceded that his party had received a “pasting.”

Political fortunes, like the ocean tides described in Shakespeare's *Julius Caesar*, flow but also ebb. Between 2004 and 2008, Democrats were borne aloft by a remarkable tide “which, taken at the flood, leads on to fortune.” But ebb tides often follow, in which fortune “is bound in shallows and in miseries.” Public attitudes today are, if anything, more hostile and pessimistic than those that produced the GOP victories in 2010. Continued economic distress bodes ill for any president—for example, George H. W. Bush, who soared to 90 percent approval after the Gulf War, failed reelection when blamed for an economy far more robust than post-2008 levels.

Such political instability makes predicting future elections even more hazardous than in quieter times. For 2012, Republicans must target the Obama administration. However, the GOP's presidential hopefuls fought furiously against each other, revealing intra-party fissures. The president, the most conspicuous target of blame, faced the Herculean task of rallying the party loyalists and swing voters who supported him in 2008. Perhaps his best course of action would be to attack the two entities less popular than himself: Congress and the Republican party. A singular historical model exists for such a campaign: Harry S. Truman in 1948 when—running against the Republicans and their “awful 80th Congress”—he won reelection for himself and for Democratic majorities in both the House and Senate. A frightened, confused, and impressionable electorate could turn against either or both parties. This situation epitomizes the

conventional wisdom that no one can confidently foretell where future political tides will carry the nation's candidates and their political parties.

ENDNOTES

1. James Bryce, *The American Commonwealth* (New York: Capricorn Books, 1959), Vol. 1, p. 296.
2. Howard Gillman, *The Votes that Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2001), p. 206.
3. Pew Research Center for the People and the Press, "Survey Report: The 2004 Political Landscape: Evenly Divided and Increasingly Polarized" (November 5, 2003), p. 1.
4. The National Election Survey (NES) is a survey and data-dissemination organization—affiliated with the University of Michigan's Survey Research Center (SRC) and supported by the National Science Foundation (NSF)—that has conducted biennial election-year surveys since 1952. The NES has since 1972 included an item asking respondents to place themselves on a seven-point ideological scale running from "extremely liberal" on the left to "extremely conservative" on the right.
5. Ronald Brownstein, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America* (New York: Penguin Books, 2007), p. 295.
6. For the record, the two House committees are the House Democratic Congressional Campaign Committee (DCCC) and the National Republican Campaign Committee (NRCC). Their Senate counterparts are the Democratic Senatorial Campaign Committee (DSCC) and the National Republican Senatorial Committee (NRSC). They are aided by the national party organizations: the Democratic and Republican National Committees (DNC and RNC).
7. Pew Center for the People & the Press, *Democrats Hold Double-Digit Lead in Competitive Districts* (October 26, 2006), p. 5.
8. Brownstein, p. 298.
9. Pew Center, pp. 1–2.
10. Ben Benenson, "Muscling Up the Majorities," *CQ Weekly* 66 (October 27, 2008), pp. 2866–2885.
11. David S. Broder, "The Amazing Race," *Washington Post* (November 2, 2008), p. B1.
12. Polling Report, *Direction of the Country*, (November 2, 2008). Polling Report.com.
13. The Conference Board, "The Conference Board Consumer Confidence Index Plummets to an All-Time Low," Press release (October 28, 2008). Conference-board.org.
14. Gallup Poll, "Bush Approval Rating Doldrums Continue," Press release (October 30, 2008). Gallup.com.
15. Pew Research Center, "Democrats Hold Party ID Edge Across Political Battleground" Press release (October 30, 2008). pewresearch.org/pubs/1018.
16. Pew Research Center, "Democrats Post Gains in Affiliation across Age Cohorts," Press release (October 31, 2008). pewresearch.org/pubs/1018.
17. Pew Research Center for the People and the Press, *Trends in Political Values and Core Attitudes: 1987–2007* (March 22, 2007). people-press.org/report/?reportid=312.

18. Chris Cillizza, "Democrats Carry Big Generic Ballot Lead," *Washington Post* (November 2, 2008), p. A1.
19. After the initial experience with the McGovern-Fraser rules, the party's officeholders complained that they were left out of the delegate selection process unless they pledged to vote for a specific candidate; so the rules were changed to create a class of "Superdelegates" apart from the formal selection process.
20. The affirmative action goals included: Latinos 26%, African Americans 16%, GLBT 12%, youth (under 30) and disabled persons, 10% each, and Native Americans 1%. California Democratic Party, *California Delegate Selection Plan for the 2008 Democratic National Convention* (Sacramento, Calif., July 2007).
21. Alexander George Theodoridis, "The Nominating Process in 2008: A Look Inside the Rube Goldberg. Did the Rules Decide?" in Larry J. Sabado, ed., *The Year of Obama* (New York: Longman, 2010), p. 231. The subsequent discussion relies substantially on Theodoridis's insightful account.
22. The delegates derived from the primary vote excluded 133 Superdelegates and local officials, pledged or not pledged to a given candidate.
23. Theodoridis, p. 239.
24. Karen Tumulty, "Five Mistakes Clinton Made," *Time* (May 8, 2008), cited in Theodoridis, p. 238.
25. Chuck Todd and Sheldon Gawiser, *How Barack Obama Won* (New York: Vintage Books, 2009), p. 23.
26. Michael Cooper, "A Blowout? No, But a Clear-Cut Win, for a Change," *New York Times* (November 7, 2008), p. A22.
27. Todd and Gawiser, p. 25.
28. Pew Research Center, "Distrust, Discontent, Anger and Partisan Rancor: The People and their Government," (April 18, 2010).
29. Pew Research Center, "Pessimism about National Economy Rises, Personal Financial Views Hold Steady," (June 23, 2011).
30. Ibid.
31. Stuart Rothenberg, "Sizing Up the 2010 Senate Contests in the Summer of 2009," *Roll Call* (August 3, 2009), p. 5.
32. Cited in David Brooks, "The Obama Slide," *New York Times* (September 1, 2009), p. A29.
33. John McArdle, "GOP Retools with 'Patriots'" *Roll Call* (February 24, 2009), p. 1.
34. Statistics are reported in Roger H. Davidson, Walter J. Oleszek, and Frances E. Lee, *Congress and its Members*, 13th ed. (Washington: CQ Press, 2012), Tables 4-3 and 4-4, Figure 4-3, and Appendix A.

The Public Presidency: Press, Media, and Public Approval

For better or worse, the public presidency envisioned and embodied by Theodore Roosevelt and Woodrow Wilson has become an essential part of the modern presidency—grafted onto, as it were, the constitutional presidency as defined by the Framers. It was Roosevelt who called the office “a bully pulpit.”¹ His cousin, Franklin D. Roosevelt (who served from 1933 to 1945), put the same thought differently. “The presidency is not merely an administrative office. That is the least of it,” he said. “It is preeminently a place of moral leadership.”² Their successors in the Oval Office have the responsibility of managing press and public relations as a constant and challenging part of the job.

For presidents, “going public” is inevitable and unavoidable. They are expected to honor the nation’s traditions, stir hope and confidence, and foster a sense of national unity and purpose. Moreover, as the quotes from the two Roosevelts imply, they can exploit their unique visibility as a strategy of presidential leadership. “Going public” is defined by political scientist Samuel Kernell as “a strategy whereby a president promotes himself and his policies in Washington by appealing to the American public for support.”³ According to Kernell, modern presidents make extensive use of this strategy because they confront mounting difficulties in bargaining directly with their constitutional counterparts (especially members of Congress) at the same time that new communications media make it easier for them to appeal to the general public over the heads of rival politicians.

An important link between presidents and the mass public is through their leadership of a political party. It is true that significant numbers of citizens claim independence from the two major parties, and that presidents themselves oftentimes want to break free of their party moorings. President Barack Obama, for example, fashioned himself as a “post-partisan” figure, appealing to members of both parties. But his initiatives revealed deep partisan divisions. After all, the major parties are still the largest and most inclusive political groupings in the country. Equally important from the president’s perspective, the parties have cultivated firm and mutually beneficial alliances with many

influential interest groups and mass-membership organizations. For the Democrats, such organizations include those claiming to represent African Americans, women, environmentalists, cultural progressives, and most trade unions. Republicans, in contrast, collaborate with groups claiming to speak for large and small businesses, the defense establishment, and cultural conservatives.

One aspect of the public presidency that is not of modern origin is the role of reporters and the press. In the early decades of the republic, many newspapers were stridently partisan in tone. The very first president, George Washington, complained bitterly about opposition papers' vicious attacks upon his administration. The Federalists were so vexed by these attacks that in 1798 they enacted the infamous (and almost certainly unconstitutional) Sedition Act, which classified any criticism or attempts to organize any criticism of the government or its leaders as criminal libel.

The Jacksonian era coincided roughly with the rise of the press as a mass phenomenon: new high-speed presses supplied cheap newspapers to an increasingly literate public. For nearly a century, the daily newspaper was the chief conveyer of public information. (New York City had 14 mass circulation daily newspapers in 1920; today it has only three.) Theodore Roosevelt, the very model of a modern president, understood that the press craved news from authoritative sources. So he began the practice of inviting small groups of reporters to the White House for informal exchanges of information about his policies. Formal press conferences were initiated by Woodrow Wilson. Since Wilson, every occupant of the presidential office has endeavored to maintain good relations with the press, although with widely varying success. Today, presidential effectiveness is often measured in terms of presidents' mastery of electronic media. For example, Franklin Roosevelt communicated forcefully through radio in the 1930s, and television was exploited effectively by John F. Kennedy in the 1960s, Ronald Reagan in the 1980s, and Bill Clinton in the 1990s.

Observers now realize that presidential campaigns are not confined to the months leading up to the quadrennial elections. Presidents, and indeed other federal elected officials, campaign virtually nonstop. In his elegant and thoughtful essay, "The 'Permanent Campaign,'" Hugh Heclo begins this section by showing how this permanent state of contested politics came about, seemingly inevitably from the changing nature of American public life: the decline of parties, the rise of special-interest groups, innovations in media technology, the advent of political professionals (public relations, polling, and the like), the need to finance the enterprise, and the continuing high stakes in national policies.

The theme of Gary C. Jacobson's essay, "Legislative Success and Political Failure," is the gap between a president's programmatic achievements and the standing of the president and his political party. His challenge is to explain why President Obama—who won a solid majority of the vote in 2008 and succeeded in the passage of major legislation—seemed so repellent in 2010 that his party lost a near-record number of seats in the midterm elections. The Republicans gained 64 House seats to seize control of the chamber, and six Senate seats to place themselves strategically to take over the Senate in 2012. First, the 2010 elections were fought mainly over national issues and

concerns: the Great Recession and its lingering effects, especially a low level of job creation; and Obama's negative image among key mobilized voter groups. Many of these highly motivated conservative voters demonized the president as unworthy of his job and as a bringer of mammoth expansion of the federal government. Thus the 2010 elections reflected the historic aspects of midterm elections: a referendum on the image and performance of the president and, by extension, his party. Also, Obama and the Democrats suffered because of structural attributes of the midterm electorate. In 2008, Obama and his party were lifted by a broad electoral base that included minorities (Blacks and Latinos). These voters tend to melt away in lesser contests, including midterm elections. In other words, no matter what Obama's level of tactical or public skills, he and his party were bound to suffer in the midterm contests.

A central attribute of all occupants of the White House is what Jeremy D. Mayer terms (in his essay, "The Presidency and Image Management") the "presidential image"—defined as "the impression Americans have of their leader as a leader and a human being." This image is partly true and partly false, partly realistic and partly fantasy. It is concocted out of four elements: (1) the president's actual appearance, character, and actions; (2) image management by the White House staff; (3) counterimages raised by the president's foes; and (4) media "takes" about who the president is really is and what he represents.

George W. Bush provides a case study for Mayer's concept of presidential imagery and image making. Bush and his advisors were remarkably disciplined at shaping the president's image and placing him in public settings that enhanced that image. Although Bush performed reasonably well in more or less open-ended events (presidential debates, for example), he was uncomfortable in unstructured situations, especially audiences that included inquisitive or hostile individuals (press conferences, for example). Scripted, structured events were therefore preferred: The chief executive was usually seen speaking or interacting with selected audiences—often in military settings—in front of backdrops containing simple slogans drawn from the topic at hand.

Images of Bush that were prevalent were those of the "regular guy" and the "wartime leader." Although Bush was by any definition the privileged offspring of a notable upper-class family, he won the likeability contest hands down against the geeky Al Gore in 2000 and the elegant but preachy John Kerry in 2004. After the terrorist attacks of September 11, 2001, Bush re-fashioned his persona to become a war leader. Although his remarks on the day of the tragedy were unmemorable, his prepared speeches over the following weeks were high points in the history of presidential rhetoric. His steadfastness in pursuing military options burnished his leadership image and linked him with an institution highly regarded by the American public. But the American public eventually tired of the war, pulling Bush's job ratings to modern low points. How his grafting of an Iraq war onto the terrorism effort will affect his long-term historical standing is, of course, still unknown.

George C. Edwards III begins his analysis in "The Presidential Pulpit: Bully or Baloney?" by noting our popularly held assumption that presidents achieve their policy goals by persuading the public and Congress about the wisdom

of presidential preferences. Theodore Roosevelt's "bully pulpit" supposedly enabled the president to lead public opinion in the direction he thought best. Edwards challenges Roosevelt's maxim and our conventional wisdom by taking up the case of Ronald Reagan, who was known as the "Great Communicator" because of his impressive powers of persuasion. He argues that Reagan in fact was not very effective at all in changing public attitudes about the policies he favored. Edwards also argues that despite his many roll-call victories in Congress, Bill Clinton was not very successful in convincing Congress to pass his major legislative initiatives. Edwards goes on to analyze the major factors that affect a president's ability to influence public opinion and, in turn Congress, and he concludes that the cards are stacked against a president who hopes to change public attitudes. Edwards maintains that as in leading Congress, presidents can lead the public only "at the margins."

The ultimate reckoning of the public presidency is of course the reactions and sentiments of the public itself. But how do we find out what people are thinking about the president? Elections are but a crude measure of public sentiment: They are infrequent and, as we saw in Section 3, they often convey a murky picture of what citizens really expect or want from the president. However, for the past 50 years or more, public opinion surveys have frequently probed presidential popularity. In such surveys, citizens are typically asked to rate the job the president is doing—excellent, pretty good, only fair, or poor. The responses are then dichotomized into "favorable" or "unfavorable" ratings. As a result, we now have a continuing and frequent referendum on the president's public support. By comparing this long-running string of data with contextual events (for example, wars, crises, economic conditions, issues of current saliency), we gain a clearer picture of how people assess presidents and their performance.

Presidents themselves are extremely conscious of their standing in the polls. However much they may belittle poll results, they are eager to take advantage of favorable ratings and work to explain away low ones (a variety of spin control). High approval ratings, it is said, may compel other politicians to follow the president's leadership or at least mute their criticisms; conversely, low ratings supposedly embolden criticism and encourage politicians to seek their own courses of action. Such claims are hard to prove empirically, but there is no doubt they are widely believed in the political community.

ENDNOTES

1. "Bully" was a favorite Rooseveltian term expressing great enthusiasm. Students inform us that "awesome" or "rad" convey something of the same meaning.
2. Quoted by Edward S. Corwin, *The President: Office and Powers 1787–1957* (New York: New York University Press, 1957), p. 273. The text of Roosevelt's remarks on the presidency was found in *The New York Times* (November 13, 1932), Sect. 8, p. 1.
3. Samuel Kernell, *Going Public. New Strategies of Presidential Leadership*, 4th ed. (Washington, DC: CQ Press, 2006), p. 2.

Reading 17

The "Permanent Campaign"

HUGH HECLLO

The term *permanent campaign* was first widely publicized early in the Reagan presidency by Sidney Blumenthal, a journalist who went on to work in the Clinton White House—and then was caught up in the semi-permanent campaign to impeach the president. Calling it “the political ideology of our age,” Blumenthal described the permanent campaign as a combination of image making and strategic calculation that turns governing into a perpetual campaign and “remakes government into an instrument designed to sustain an elected official’s popularity.”

SHOULD CAMPAIGNING AND GOVERNING DIFFER?

In one sense—a promissory sense—it seems clear that campaigning and governing should have much in common. Any democratic political system is based on the idea that what happens in government is related to people’s electoral choices. Elections and their attendant campaigns are not a thing apart from, but integral to, the larger scheme of democratic government, both in guiding responses to the past election and in anticipating reactions to the next. In the long run, without good-faith promise making in elections and promise keeping in government, representative democracy is unaccountable and eventually unsustainable.

Although the two necessarily relate to each other, good reasons exist to think that campaigning and governing ought not to be merged into one category. Common sense tells us that two different terms are necessary, because we know that promise making is not promise keeping, any more than effective courtship is the same thing as well-working marriage. . . .

While the designers of the U.S. Constitution had little use for parties and popular electioneering, the campaign analogy was not threatening in the 19th century, precisely because popular appeals had to be shaped to the constitutional system the framers had designed. On the one hand, it was a system brimming with elections—eventually hundreds for the federal House of Representatives, dozens in state legislatures for the Senate, and dozens more for the presidency (through the state electors), not to mention the thousands of elections for the state governments of the federal system. On the other hand, no one election or combination of elections was decisive. No election could trump any other as the one true voice of the people. The people, through

Source: Reprinted from *The Permanent Campaign and Its Future*, ed. Norman Ornstein and Thomas Mann (Washington: American Enterprise Institute for Public Policy Research and the Brookings Institution, 2000), 1–37. Used by permission of the Brookings Institution.

elections shaped to the multiplex constitutional structure, were held at arm's length. Governing was what had to happen inside the intricately crafted structure of the Constitution. Every part of that structure derived its authority from—and was ultimately dependent on—the people. But the people never all spoke at the same time, and they never had residence in any one part or in the whole of the government quarters. Inside those quarters institutions were separated, and powers were shared, so that there would be a lot going on inside—a rich internal life to governing, a place of mutual accommodation and deliberation—if only because no one could do anything on his or her own, although each could defend his or her own turf. The people were outside—in the open countryside to which their governors would have to come to give account of their stewardship. . . .

In at least three important ways campaigning and governing point in different directions—that is to say, not always in opposite but in sufficiently divergent directions to matter.

① *Stance*
First, campaigning is geared to one unambiguous decision point in time. In other words, campaigning must necessarily focus on affecting a single decision that is itself the outcome, the event determining who wins and who loses. Governing, by contrast, has many interconnected points of outcome through time—the line decision, so to speak, of the “going concern.” Anyone who has worked in a political campaign will probably recall the initial enthusiasms of launching the campaign, the accelerating pace and growing intensity, the crashing climax of election day, and the eerie stillness of cleaning out the campaign offices in the period immediately following. Governing is different. It is a long persistence with no beginning or final decision point, something like a combination of digging a garden in hard ground and the labors of Sisyphus. The time scale for campaigning has historically been short and discontinuous, while that for governing stretches beyond the horizon.

②
Second, within its fixed time horizon, campaigning is necessarily adversarial. Nineteenth-century political writers borrowed the military metaphor precisely because it captures the essential idea of a contest to defeat one's enemy. The competition is for a prize that cannot be shared, a zero-sum game. In comparison with a campaign, governing is predominantly collaborative rather than adversarial. While campaigning would willingly drown out its opponent to maximize persuasion, genuine governing wishes an orderly hearing of many sides, lest the steersman miss something important. In that sense, campaigning is self-centered, and governing is group-centered.

③
In the third place, campaigning is inherently an exercise in persuasion. The point of it all is to create those impressions that will yield a favorable response for one's cause. In contrast, governing places its greatest weight on values of deliberation. While good campaigning often persuades by its assurance and assertions, good governing typically depends on a deeper and more mature consideration. This is so because whatever conclusions governing comes to will be backed by the fearsome power of the state. Taking counsel over what to do and how to do it lies at the heart of the governing process. Of course, it has to be acknowledged that *deliberation* may sound too genteel a term for

the knife fights that are often associated with governing, especially along the banks of the Potomac. Nevertheless, the men and women governing public policy do make up a going concern as they bargain and seek to persuade each other inside the constitutional structure. The deliberation in view here means nothing more profound or high-minded than that.

Creating the Permanent Campaign

As noted at the outset, permanent campaign is shorthand for an emergent pattern of political management that the body politic did not plan, debate, or formally adopt. It is a work of inadvertence, something developed higgledy-piggledy since the middle of the 20th century, much as political parties became part of America's unwritten constitution in the 19th century. The permanent campaign comprises a complex mixture of politically sophisticated people, communication techniques, and organizations—profit and nonprofit alike. What ties the pieces together is the continuous and voracious quest for public approval. Elections themselves are only one part of the picture, where the focus is typically on personalities and the mass public. Less obvious are the thousands of orchestrated appeals that are constantly underway to build and maintain favor of the certain publics and targeted elites for one or another policy cause.

What we can identify and discuss without doing excessive injustice to the subject are the political instrumentalities that give expression to the deeper development of political culture. Those features proved important in creating the permanent campaign, and one can conveniently group them into six categories. The point is not to describe each in detail but to show the logic that has connected those emergent properties into a coherent pattern during the past 50 or so years—the pattern of campaigning so as to govern and even governing so as to campaign.

The Decline of Political Parties

Where parties have become much weaker is at the level of political fundamentals—generating candidates for office and being able predictably to mobilize blocs of people to vote for them. The cumulative effect of many changes from the late 19th century onward—ending the “spoils” system in public employment, electoral reforms and party primaries, suburbanization, and television, to name a few examples—was largely to destroy the parties' control over recruitment and nomination of candidates for office. Concurrently, the general trend since the middle of the 20th century has been a gradual decline in the strength of voters' identification with the two major parties. The 20th-century change in American parties represents a general shift from party-centered to candidate-centered elections, in an “every man for himself” atmosphere. Because politicians cannot count on loyalties from party organizations, voting blocs of the New Deal coalition, and individual voters, after the 1950s, politicians have had every reason to try to become the hub of their own personal permanent campaign organizations.

Although much weaker on the recruitment side, political parties have also become stronger in other dimensions that intensify the permanent campaign. In the last quarter of the 20th century, party coalitions grew more ideologically and socially distinctive. Simultaneously, the national party organizations' ability to raise and distribute money vastly increased. The central headquarters of each party also became more adept at constructing national election strategies and campaign messages to attack the other party. At the same time, two-party conflict in Congress became more ideologically charged and personally hostile. With that development came congressional leaders' growing use of legislative campaign committees to raise money, set agendas, and define the party image. All that has provided the financial wherewithal and career interest for more sustained and polarized political warfare. In short, both where parties have become weaker and where they have become stronger, the effect has been to facilitate a climate of endless campaigning.

Open Interest-Group Politics

A second feature creating the permanent campaign is the rise of a much more open and extensive system of interest-group politics. "Opening up the system" became a dominant theme of American politics after the Eisenhower years. On the one hand, to open up the system meant that previously excluded Americans—minorities, women, youth, consumers, and environmentalists, for example—demanded a voice and place at the table. The civil rights movement was in the vanguard, followed by many others. With the politics of inclusion came more advocacy groups and a nurturing environment for that minority of Americans who were inclined to be political activists. On the other hand, opening up the system also meant exposing all aspects of the governing process to public view. In the name of good government and participatory democracy, barriers between policy-makers and the people were dismantled. Open committee meetings, freedom-of-information laws, publicly recorded votes, televised debates, and disclosure and reporting requirements symbolized the new openness. The repeal of public privacy had a sharp edge. After Vietnam, Watergate, and other abuses of government power, deference to public officials became a thing of the past. Replacing that deference were investigative journalism and intense media competition for the latest exposé. People in public life became themselves the object of a new regime of strict ethics scrutiny and exposure—and thus tempting targets in a permanent campaign.

New Communications Technology A third feature is the new communications technology of modern politics. The rise of television after the 1940s was obviously an important breakthrough in personalizing direct communication from politicians and interest groups to a mass public. Candidates for office could move from retailing their appeals through party organizations to direct wholesaling with the voting public. Likewise, groups could use protests and other attention-grabbing media events to communicate their causes directly to a mass audience. For both politicians and advocacy groups, communication

with the public bypassed intermediaries in the traditional three-tiered "federal" structure of party and interest-group organizations, where local, state, and national commitments complemented each other. In place of the traditional structure could grow something like a millipede model—direct communication between a central body and mass membership legs. Of course, the story did not stop with broadcast television but went on to include cable TV, talk radio, the 24-hour news cycle, "narrowcasting" to target audiences, and the Internet. Explosive growth in the electronic media's role in Americans' lives provided unfathomed opportunities to crossbreed would-be campaigners and governors. . . .

As Walter Lippmann saw in analyzing the popular print media in the early 20th century, communication must be of a kind that translates into audience shares and advertising dollars. That has meant playing up story lines that possess qualities of dramatic conflict, human interest, immediacy, and strong emotional value. The easiest way for the media to meet such needs has been to frame the realities of governing in terms of political contests. The political-contest story about government makes complex policy issues more understandable, even if the "understanding" is false. It grabs attention with short and punchy dramas of human conflict. It has the immediacy of a horse race and a satisfying resolution of uncertainty by naming winners and losers. In addition, of course, it does much to blur any sense of distinction between campaigning and governing. . . .

New Political Technologies The fourth feature underlying creation of the permanent campaign is what we might call new political technologies. At the same time as changes in parties, interest groups, and electronic media were occurring, the twin techniques of public relations and polling were invented and applied with ever growing professional skill in the public arena. Together, they spawned an immense industry for studying, manufacturing, organizing, and manipulating public voices in support of candidates and causes. The cumulative result was to impart a much more calculated and contrived quality to the whole political process than anything that prevailed even as recently as the 1950s.

Over time, consultants and pollsters moved into the political front office. After the 1960s, increasingly specialized political consultant services developed and were fortified by professional polling to cover every imaginable point of contact among politicians, interest groups, and the people being governed. The basic features of the political marketing landscape include the following services: poll and focus-group research, strategic planning, image management, direct-mail marketing, event management, production of media materials, "media buys," opposition research against competitors, and orchestration of "grassroots" citizen campaigns. . . .

Need for Political Money The fifth factor in the creation of the permanent campaign amounts to a logical consequence of everything else that was happening. It is the ever-growing need for political money. It turns out that most

of what political marketing does resolves into spending money on itself—the consultants—and the media. Hence, after the 1960s, an immense new demand grew for politicians and groups to engage in nonstop fund-raising. Even if the people managing the new technologies—media, polling, and public relations—were not in profit-oriented businesses, the new forms of crafted politics would have cost huge amounts of money to create and distribute. As it was, the splendid profits to be made helped add to even larger political billings. For example, in 1994, the 15 most expensive Senate campaigns in the United States devoted almost three-quarters of their funds to consultants' services.

Stakes Involved in Activist Government To close the circle of forces behind the permanent campaign, we need to revisit the obvious. Granted a massive and growing need for more political money exists. But why should anyone pony up the money? What we might easily overlook is the obvious point that the permanent campaign exists, because there is something big and enduring to fight about. The stakes involved in activist government are what make it worthwhile to pay out the money that keeps the permanent campaign going and growing. At the simplest level, one might call that the Microsoft effect. Only after Bill Gates found that the federal government had an Antitrust Division did Microsoft lobbyists and contributions to both parties begin appearing to demonstrate the company's commitment to civic education and participation.

If the federal government were as small a part of people's lives and of the economy as it was during the first half of the 20th century, we can be sure that there would be far less interest in the continual struggle to influence the creation, administration, and revision of government policies. Campaigning has become big and permanent, because government has become big and permanent. One is speaking here of more than the obvious benefits to be derived from influencing spending and taxation. . . . It is not even a matter of the federal government's growing regulatory power over society and the economy. The deeper reality is a pervasive presence of public policy expectations. . . .

To say it another way, conceptions of who we are as a people became increasingly translated into arguments about what Washington should do or should stop doing. . . .

* * *

The campaign without end is not a story of evil people's planning and carrying out nasty designs on the rest of us. Rather, it is more like a story of things all of us would do, given the incentives and what it takes to win under changing circumstances. The story's central narrative is the merger of power-as-persuasion inside Washington with power-as-public-opinion manipulation outside Washington. The two, inside and outside, governing and campaigning, become all but indistinguishable—as they now are in any one of the big-box lobbying or consulting firms in Washington. The paradox is that a politics that costs so much should make our political life feel so cheapened.

CONCLUDING UNSCIENTIFIC POSTSCRIPT

... The permanent campaign is not the way Americans do politics, but the way politics is done to them. Without calling it by that name, the way most Americans do politics is by not doing what they consider "political" but by engaging in a myriad of local volunteer activities—politics in particular. That is all to the good and worth remembering. However, it is also true to say that the handiwork of professional consultant-crafted politics is now probably the only version of nonlocal politics that the average American ever experiences.

The pervasiveness of political marketing means that all national politics take place in a context of permanent, professionally managed, and adversarial campaigning to win the support of those publics upon whom the survival of the political client depends. Into the media are poured massive doses of what historian Daniel Boorstin discerned in the 1960 birth of TV politics and called pseudo-events. They are not spontaneous, real events but orchestrated happenings that occur because someone has planned, incited, or otherwise brought them into being for the purpose of being observed and swaying opinion. Leaks, interviews, trial balloons, reaction stories, and staged appearances and confrontations are obvious examples that most of us hardly recognize as "pseudo" anymore. It is difficult to know anything about national affairs that is not subject to the ulterior motives of professionals in political management or in the media, a distinction that itself is tending to dissolve.

What is the result of transforming politics and public affairs into a 24-hour campaign cycle of pseudo-events for citizen consumption? For one thing, the public is regularly presented with a picture of deeper disagreements and a general contentiousness about policy issues than may in fact be true when the cameras and microphones are turned off. Second, immense encouragement is given to the preexisting human tendency to overestimate short-term dramatic risks and underestimate the long-term consequences of chronic problems. Third, public thinking is focused on attention-grabbing renditions of what has gone wrong for which somebody else can be blamed. Thus, any attempt to debate policy continually reinforces a culture of complaint and victimization where seemingly dramatic conflicts never really settle anything or lead anywhere. ...

The term that perhaps best describes what happens in the permanent campaign is instrumental responsiveness. It is a hands-on approach to leveraging and massaging opinion to make it serve one's own purposes. The campaigners do not engage the public to teach people about real-world happenings and thereby disabuse them of false hopes or encourage forbearance against harsh realities. Rather, the permanent campaign engages people to tell them what they want to hear in ways that will promote one's cause against others. Such instrumental responsiveness appears to be the system's functional philosophy, even while mimetic responsiveness—doing the people's will—is its confessional theology.

Why should one care? Because our politics will become more hostile than needed, more foolhardy in disregarding the long-term, and more benighted in mistaking persuasions for realities. The case for resisting further tidal drift into the permanent campaign rests on the idea that a self-governing people should not wish to become more vile, myopic, and stupid. Apart from that, there probably is not much reason to care.

Reading 18

Legislative Success and Political Failure: The Public's Reaction to Barack Obama's Early Presidency

GARY C. JACOBSON

The idea that a president's legislative and political success go hand in hand is starkly contradicted by the first two years of Barack Obama's presidency. With the help of Democratic majorities in the House and Senate, Obama pushed through a huge economic stimulus package targeting the deep recession he had inherited, initiated comprehensive reforms of the nation's health care system, and signed a major redesign of financial regulation aimed at preventing a repeat of the financial meltdown that had made the recession so severe. These legislative achievements made the 111th Congress among the most productive in many years, and they were fully consistent with promises Obama made during his successful campaign for the White House. Obama also kept his campaign pledge to wind down the United States' involvement in Iraq and to reallocate American forces to confront the resurgent Taliban in Afghanistan.

In short, Obama had done what he might reasonably believe he was elected to do. His reward was to see his Democratic Party suffer a crushing defeat in the 2010 midterm elections, with Republicans gaining 64 House seats to win their largest majority (242–193) since 1946, and six Senate seats, putting them within easy striking distance of a majority in that chamber in 2012.¹ Not only did the president and his party reap no political benefit from their legislative accomplishments, they were evidently punished for them. The congressional Republicans' strategy of all-out opposition, adopted not long after Obama took office, turned out to be remarkably successful, delivering a stunning setback to a majority party that had won a sweeping victory just two years earlier.

Scholars will be debating explanations for this swift turn of events for some time to come. The Obama administration's priorities, legislative strategies, and political acumen are sure to come under critical scrutiny. My purpose here is somewhat different. I focus on the state of public opinion regarding Obama and his party during his successful election campaign and on its evolution during his first two years in office, looking for clues about where, why, and how legislative and even policy successes turned into political failures that ended up devastating Obama's party on election day.

BACKGROUND: THE 2008 ELECTION

Public opinion toward Obama during his first two years in office featured wide partisan divisions, unusually intense hostility among his detractors, and extraordinarily strong connections between popular opinions of Obama, his party, his policies, and, ultimately, voting decisions in the 2010 elections. The evidence presented in this article suggests that Obama has become a stronger anchor for political attitudes, positive and negative, than even his predecessor, George W. Bush. Bush had been a highly polarizing figure, inspiring the widest partisan differences in presidential evaluations since the advent of modern polling. By 2008, however, even Republicans had lost some of their enthusiasm for him, and he was receiving exceedingly low marks from Democrats and independents (Jacobson 2011a). Bush's unpopularity, mainly a legacy of the Iraq War, but reinforced by the financial crisis and sharp economic downturn near the end of his term, tarnished his party's image, drove independent voters toward the opposition, and contributed crucially to Obama's victory (Jacobson 2010a).

Obama's election did not signal any narrowing of partisan divisions. According to the 2008 American National Election Study,² party-line voting, at 89.1%, was second only to 2004's 89.9% in the ANES series going back to 1952.³ Self-identified Republicans accounted for only 4.4% of Obama's voters, the smallest cross-over vote for any winning presidential candidate since John F. Kennedy in 1960. Moreover, voters who had supported his opponent, John McCain, tended to accept the McCain campaign's portrayal of Obama as a radical leftist (Conroy 2008; Drogan, and Barabak 2008; Kenski, Hardy, and Jamieson 2010). As Figure 18.1 shows,

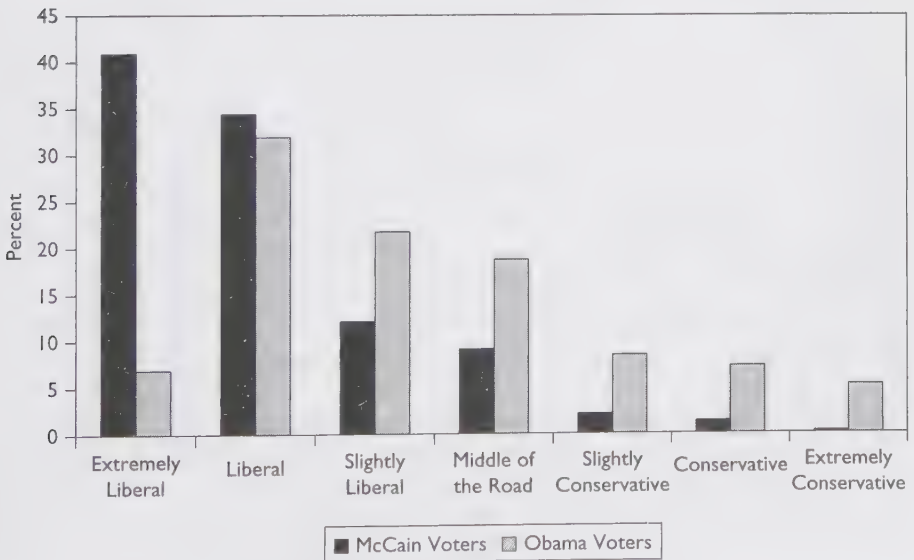


FIGURE 18.1

Voters' Placement of Obama on the Liberal-Conservative Scale.

Source: 2008 ANES.

41% judged him an “extreme liberal” and another 34% “liberal” on the ANES’s 7-point liberal-conservative scale; only 23% put him in the middle three categories (slightly liberal, middle of the road, slightly conservative). Obama’s voters, in contrast, saw him as much more moderate; 49% placed him in the middle three categories, 32% classified him as a liberal, and only 7% rated him an extreme liberal.

McCain voters, on average, placed Obama at 2.0 on the 7-point scale, further left than Republican voters had placed any previous Democratic candidate, including George McGovern in 1972. They also placed him further to the left of their own ideological location, by an average of 3.1 points, than Republican voters had placed any previous Democratic candidate (the average distance for candidates from McGovern through John Kerry was 2.1 points). Moreover, the more conservative McCain voters were themselves, the more liberal they perceived Obama to be (Figure 18.2), whereas the more conservative the Obama voters, the more conservative they considered Obama. Obviously, the psychological processes of contrast (among McCain voters) and assimilation (among Obama voters) were powerfully at work (Sherif and Hovland 1961).⁴ On average, Obama’s voters placed him slightly left of center (at 3.3, where 4 is dead center) and slightly to their own right, an appropriate location for a leader of the Democratic Party’s diverse center-left coalition.

The campaign by McCain (and especially his running mate, Sarah Palin) to brand Obama as a radical leftist, while insufficiently persuasive to defeat him, certainly resonated with many conservatives. This is no surprise, for Obama’s race, background, personality, and political style were guaranteed to antagonize

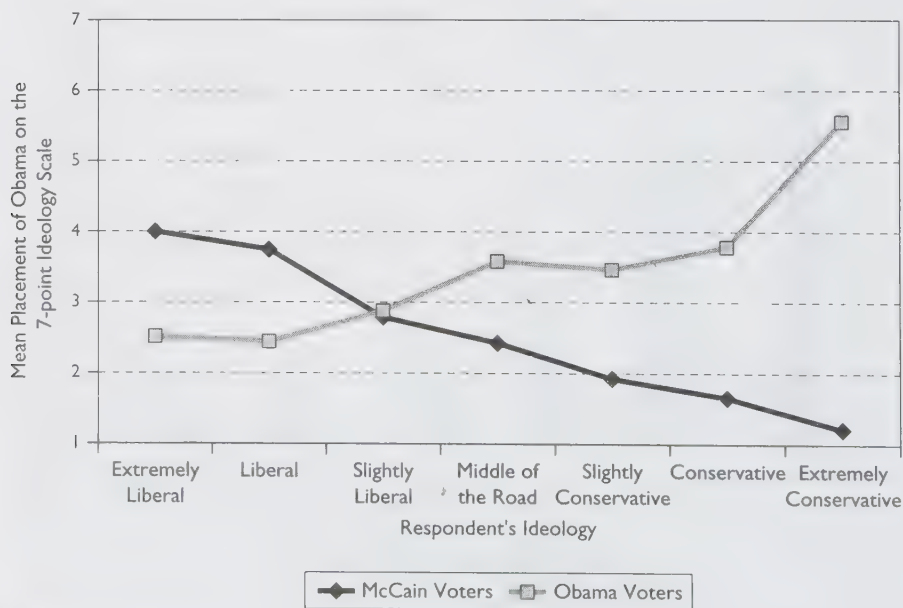


FIGURE 18.2

Perceptions of Obama’s Ideology by Respondent’s Ideology (7-Point Scale).

Source: 2008 ANES.

identifiable factions on the political right. An African American carrying a foreign-sounding name with “Hussein” in the middle, Obama also has an Ivy League education, a detached manner, and a nuanced, cerebral approach to politics. He passed a portion of his childhood in predominantly Muslim Indonesia. Entering politics as a community organizer on Chicago’s South Side, Obama maintained links with local black activists and leaders, some with fairly radical views, including his long-time minister, Rev. Jeremiah Wright. Obama was thus bound to vibrate the racist, xenophobic, anti-intellectual, and antielitist as well as antiliberal strands woven into the fabric of right wing populist thinking. Among people sharing this mindset and others who simply accepted the McCain campaign’s depiction of Obama as an unreconstructed 1960s-style radical with a socialist agenda, his election was bound to be alarming, his every action scrutinized for signs of his “true” intentions. The 2008 campaign thus planted the seeds for the intense aversion to Obama and his policies that later blossomed in the Tea Party movement.

The 2008 election also featured the highest levels of party loyalty among House and Senate voters and lowest levels of ticket-splitting between president and House or Senate candidates in more than four decades.⁵ As a consequence, the number of split districts was also unusually low, and relatively few congressional Republicans shared a significant portion of their electoral constituents—the people whose votes had elected them—with Obama. This is evident from data in the 2008 Cooperative Congressional Election Study, which with 32,800 respondents is large enough to provide estimates of partisan voting at the House district level.⁶ Figure 18.3 displays the frequency distribution of House districts across 5-point ranges of Obama’s 2008 vote share according to the percentage

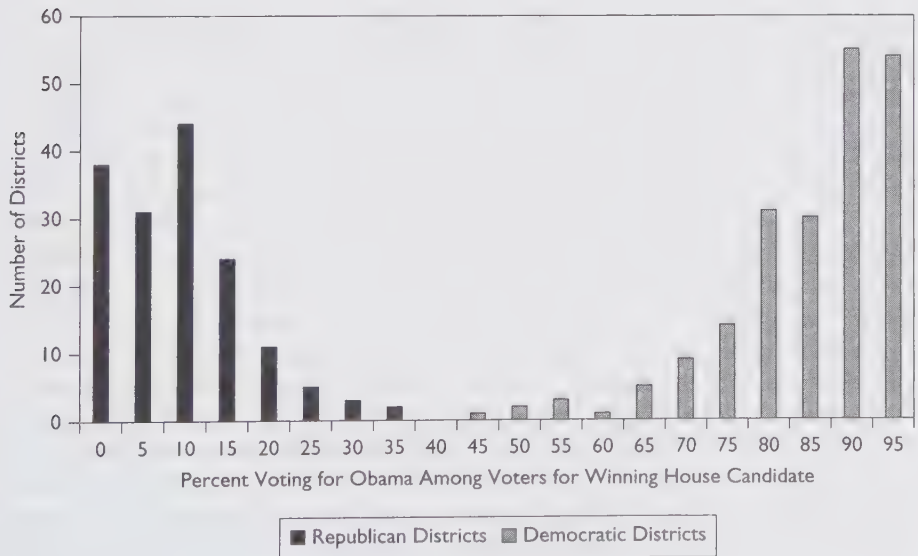


FIGURE 18.3

The Distribution of Shared Electoral Constituencies Across House Districts.

Source: 2008 CCES.

of voters in the district who also supported the winning House candidate. Few Republicans in the 111th House represented districts where their own supporter had also given Obama significant backing; in 87% of Republican districts, fewer than 20% of Republican voters also voted for Obama. There was a slightly larger number of districts where a substantial proportion of voters for the winning Democrat preferred McCain; still, in 82% of Democratic districts, more than 80% of the Democrats' electoral constituents also supported Obama. The electoral connection thus gave a large majority of congressional Republicans little incentive to support the president's agenda and little to lose by adoption of a strategy of all-out opposition. It also established conditions for continuing high levels of partisan polarization in Congress.

In sum, the 2008 election laid a foundation for both the elite and mass responses to the Obama and his policy agenda observed during the first two years of his presidency. The next section examines how and why successful action on that agenda failed to deliver political dividends.

FIXING THE ECONOMY

TARP

On taking office, Obama's first necessity was to address the deep recession that had begun in December 2007 and was to last for the next 18 months. The financial crisis that came to a head in the summer of 2008 in the wake of a collapse in housing prices had accelerated the economic downturn. Large financial institutions with huge positions in mortgage-backed bonds faced bankruptcy, a prospect that threatened to freeze the credit markets essential to the functioning of the American and international economies. The Bush administration responded with the Troubled Asset Relief Program (TARP), a \$700 billion rescue package for banks and other financial institutions that passed with bipartisan support in September 2008. As Senator and candidate, Obama had supported the bailout, and his administration adopted TARP as its own, including its expansion to cover loans designed to keep General Motors (GM) and Chrysler from going out of business.

TARP was unpopular from the start, for its immediate effect was to bail out the banks and insurers whose greed and recklessness had done so much to create the problem. That it actually worked did not make it any more popular. TARP stabilized the financial sector, revived the credit markets, saved Chrysler and GM from bankruptcy, and is projected to cost taxpayers no more than \$25 billion of the \$700 billion allocated, a modest price indeed if it helped prevent a rerun of the Great Depression (Rooney 2010). The stock market rebounded, and by early December 2010 the S&P 500 was up 79% from its March 2009 low. TARP did not, however, prevent steep increases in unemployment, mortgage foreclosures, and business failures as the recession deepened. Thus, notwithstanding a broad consensus among economists that allowing the big banks and auto companies to fail would make the economic downturn much worse, most Americans were not convinced that TARP helped. The opinions about the benefits of the TARP loans expressed in the August 2010 NBC News/*Wall Street Journal* survey are typical (Table 18.1); more people thought the loans hurt than

TABLE 18.1**Opinions on the Effects of Obama's Policies on the Country**

	All		Democrats		Independents		Republicans	
	Helped	Hurt	Helped	Hurt	Helped	Hurt	Helped	Hurt
Bank loans	18	45	27	27	16	51	10	58
Auto company loans	34	37	44	24	33	39	23	51
Economic stimulus	30	30	50	7	27	33	12	52
Financial regulation	29	14	40	6	30	14	15	24

Source: NBC News/Wall Street Journal Poll, August 26–30, 2010.

thought they helped the country, with particular skepticism about the bank bailout. Only regarding the auto company loans and only among Democrats were assessments of TARP more positive than negative. The political problem was that TARP had plainly failed to help the millions of Americans who had lost their jobs, homes, and businesses, while few people who remained employed, housed, or in business because the economic contraction had not been even more severe attributed their good fortune to TARP. And although TARP had been initiated by the Bush administration, by the summer of 2010, more people believed it was Obama's program than remembered it had been Bush's idea.⁷

The Stimulus Bill

Obama's own initiative for addressing the recession was the American Recovery and Reinvestment Act of 2009, a \$787 billion package (later grown to \$814 billion) combining tax cuts and incentives, expanded unemployment and other social welfare benefits, and spending on infrastructure, energy development, education, and health care. The bill passed in February, 2009, with no Republican votes in the House and only three in the Senate. As with the bank bailout, the benefits of the stimulus package for ordinary Americans were at best ambiguous. It may have increased economic growth by as much as 4.5% and saved as many as 3.3 million jobs, as the Congressional Budget Office (CBO) concluded,⁸ but the unemployment rate was higher in December 2010 (9.8%) than it had been when the bill was passed (8.2%). Partisan divisions on the efficacy of the stimulus bill mirror its partisan origins (Table 18.1), but only half the Democrats thought it had helped and majorities of independents joined Republicans in deeming it more hurtful than helpful.

The Obama administration not only failed to convince most Americans that the stimulus had helped but also failed to get across the point that it had given 94% of working Americans a tax cut and that federal taxes had thus gone down—by about \$240 billion—rather than up, during Obama's tenure (Przybyla and McCormick 2010). A September 2010 CBS News/*New York Times* survey found that one-third of public held the mistaken belief that taxes had increased, while only 8% recognized taxes had in fact decreased, with the remainder saying they had stayed the same.⁹

Financial Regulation

The Obama administration's other principal response to the economic crisis was embodied in the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law July 21, 2010. This broad revision of the rules regulating the financial sector was designed to prevent a recurrence of banking crisis, avoid future bailouts, and protect consumers from predatory banking and credit practices. The action was supported by a solid majority of Americans, including a substantial share (although still a minority) of Republicans.¹⁰ However, most Americans remain undecided on its efficacy (Table 18.1),¹¹ a reasonable position because most of the rulemaking needed to realize the new regulatory regime has yet to be completed. Moreover, despite its popularity, the bill may have actually hurt Democratic candidates in 2010, for it fed perceptions in the financial sector and elsewhere in the corporate world that Obama and the Democratic congressional leaders were unsympathetic to business interests, a perception helped finance lavish independent campaigns aimed at ending Democratic control of Congress (Jacobson 2011c).

Taken together, the data in Table 18.1 underline political ineffectiveness of the Obama administration's response to the economic crisis. Most Americans did not hold Obama responsible for the recession; every survey taken during Obama's first two years in office found more people blaming Bush for the current state of the economy than Obama, typically by ratios of more than two to one, and when "Wall Street" and "Congress" are added to the list of possible culprits, the percentage of respondents assigning Obama primary responsibility has been in single digits.¹² But most Americans also believed that his administration had failed to address the problem effectively, for the economic recovery that began in the summer of 2009 produced too few jobs to cut the unemployment rate. Although Obama's popular standing with the public was certainly

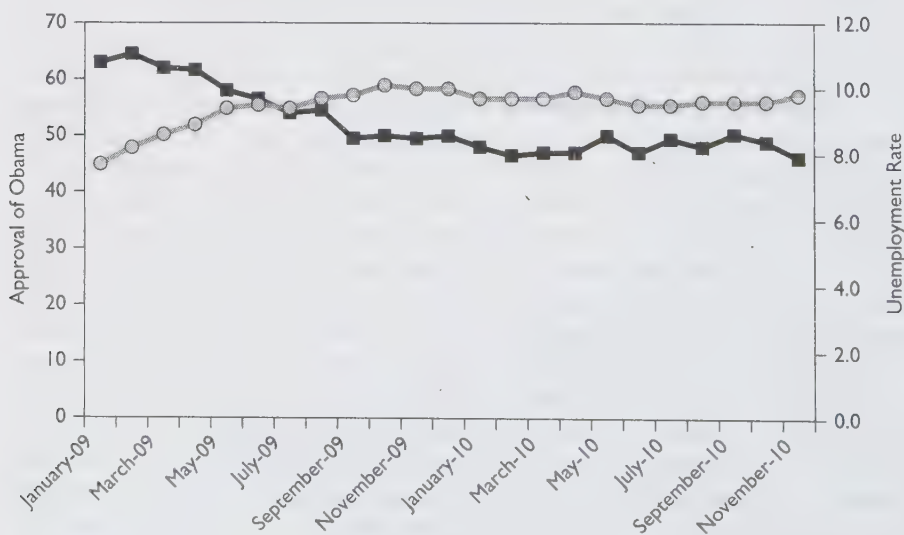


FIGURE 18.4

Unemployment and Approval of Obama's Job Performance (Monthly Averages).

affected by issues besides unemployment, it is worth observing that his approval ratings fell in lock step with the rise in unemployment during his first year in office¹³ and subsequently remained flat as unemployment also held more or less steady (between 9.5 and 10.1%) for the next 15 months (Figure 18.4).

HEALTH CARE

Important as they were, Obama's policies for addressing the recession were not nearly as politically consequential as his efforts to restructure the health care system. The passage of the Patient Protection and Affordable Care Act, signed into law on March 22, 2010, fulfilled a central promise of Obama's 2008 campaign, but both the process and the product proved controversial and divisive. Implementation of the complex legislation is not scheduled to be completed until 2014, and its effects on the cost and quality of health care will not be known for many years. Its political effects, however, were immediate and profound.

The Tea Party Movement

First, people susceptible to the McCain-Palin campaign's depiction of Obama as a radical leftist took his health care reform initiative as confirmation, fueling the emergence of the Tea Party movement, which became the locus and loudest transmitter of fervently anti-Obama sentiments. Egged on by conservative voices on talk radio, Fox News, and the Internet, some Tea Partiers came to see Obama as not merely an objectionable liberal Democrat, but as a tyrant (of the Nazi, Fascist, Communist, Socialist, Monarchist, or racist variety, depending on the critic¹⁴) intent on subjecting Americans to, variously, socialism, communism, fascism, concentration camps, or control by United Nations, Interpol, international bankers, the Council on Foreign Relations or the Trilateral Commission (Barstow 2010). Not all Tea Party adherents (12 to 18% of the public) or sympathizers (about a third of the public¹⁵) entertain such fancies, but they are nearly unanimous in their antipathy toward Obama and belief that his policies are moving the country toward socialism.¹⁶ They are also overwhelmingly white, conservative, and Republican or independent leaning Republican (83 to 88%, depending on the survey); few—on the order of 10%—had voted for Obama in 2008. Although some Tea Partiers express disdain for the Republican establishment, the movement's sympathizers fit seamlessly into the party's conservative core, expressing opinions typical of ordinary Republicans, only with more thorough conservative orthodoxy (Jacobson 2011b). They also tend to hold attitudes locating them toward the high end of the racial resentment scale (Parker and Barreto 2010).

Tea Party sympathizers and other Republicans manifest their disdain for Obama by, among other things, denying his American birth (and thus eligibility to be president) and Christian religion. An April, 2010 CBS News/*New York Times* poll found 32% of Republicans and 30% of Tea Party activists saying that Obama was foreign born, with only 41% saying he was born in the United States; other polls report similar results.¹⁷ About the same proportion of

Republicans—31% in an August, 2010, Pew survey—also said that Obama is a Muslim, more than thought him a Christian (27%).¹⁸ A *Time* survey taken the same month found an even more remarkable 46% of Republicans expressing this misconception; among the 60% of Republicans calling themselves conservatives, 57% said Obama was a Muslim, with only 14% saying he was a Christian. This was not meant as a compliment; 95% of Republicans who thought Obama was a Muslim disapproved of his job performance.¹⁹

Examination of a pair of Pew surveys suggests that causality runs more strongly from opinions of Obama to beliefs about his religion than in the opposite direction, for as Obama's approval ratings fell, the proportion calling him a Muslim grew. Between Pew's March 2009 and August 2010 polls, Obama's approval rating dropped from 59% to 47%, and the proportion saying he is a Muslim rose from 11% to 18%, while the proportion of disapprovers saying he is a Muslim held about steady (21% in the first survey, 23% in the second). These beliefs help to explain why 52% of the Republican respondents to the August 2010 *Newsweek* poll said it was definitely (14%) or probably (38%) true that "Barack Obama sympathizes with the goals of Islamic fundamentalists who want to impose Islamic law around the world."²⁰ That so many of Obama's detractors voice such bizarre notions is testimony to how thoroughly alienated from the president they have become.

The Republican Strategy

A second major effect of the health care debate was to convince Republican congressional leaders that a strategy of all-out opposition to Obama was their ticket back to majority status. The anger and energy manifested by the Tea Party movement, and, more important, the election of Republican Scott Brown in January 2010 to the late Edward Kennedy's Senate seat in Massachusetts on a platform opposing Obama's health care plan, inspired united Republican opposition to changes in the health care system that, as its Democratic defenders were fond of pointing out, look very much like those Republican presidential aspirant Mitt Romney had pushed through when he was governor of Massachusetts and that Republicans had proposed as alternatives to Bill Clinton's plan in 1993. Republican leaders even adopted the Tea Party's apocalyptic rhetoric in denouncing the legislation: House minority leader John Boehner called the struggle over the final vote "Armageddon" because the bill would "ruin our country."²¹ His Republican colleague, Devin Nunes of California, declared that with this "Soviet"-inspired bill, Democrats "will finally lay the cornerstone of their socialist utopia on the backs of the American people."²²

Public Opinion on Health Care Reform and Obama

The public was and remains fairly evenly divided over the extraordinarily complicated health care reform package; more people offer unfavorable than offer favorable reviews (by about 5 percentage points on average), but some do so because it promises too little rather too much government involvement.

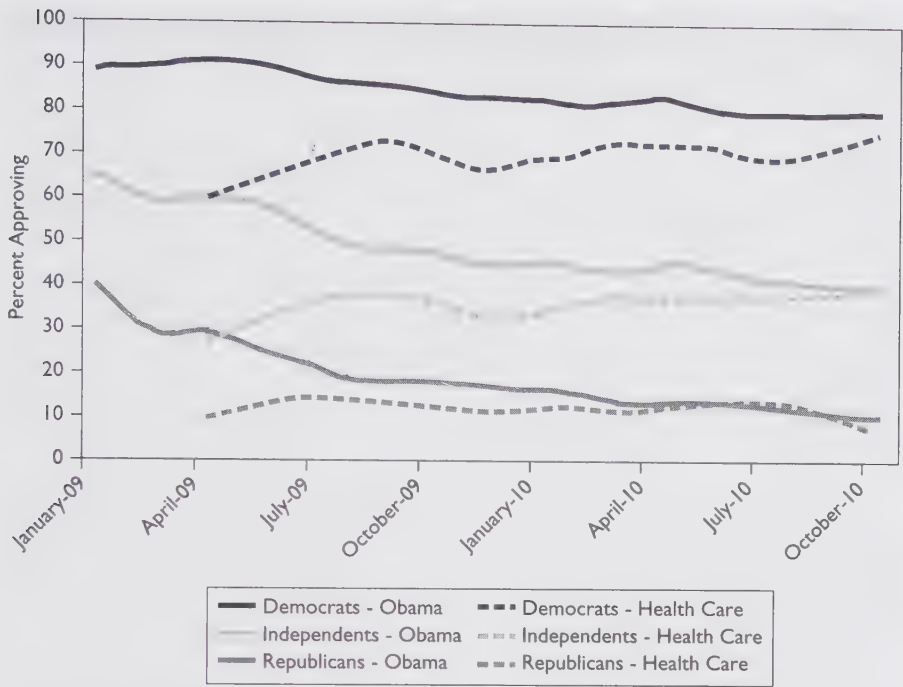


FIGURE 18.5

Partisan Opinion on Health Care Reform and Obama's Job Performance.

Source: See footnote 24.

Some of the legislation's elements are quite popular, some not; predictably, majorities tend to like the benefits and to dislike paying the costs required to produce them.²³ But reflecting and reinforcing the partisan battles in Washington, opinions on the overall package were sharply divided along party lines, contributing to the even wider divisions in assessments of Obama's job performance (Figure 18.5).²⁴ Although this partisan divide has yet to reach the record levels inspired by Bush during his second term, it is wider than under any president before Bush.

The extent to which health care became a touchstone issue for assessments of Obama's presidency is evident in the extraordinarily strong cross-sectional relationship between opinions of Obama's job performance and his health care reforms. On average during 2010, 89% of respondents offered consistent opinions of Obama and the legislation, approving of both or disapproving of both.²⁵ To put these numbers in perspective, opinions of Obama and his health care proposals were even more tightly linked than were opinions of Bush and the Iraq War (an average consistency rate of 83%; see Jacobson 2008, 80). Opinions on Obama's handling of the issue were also more closely related to his overall job performance rating than were his ratings on the handling of any other issue.²⁶

The pivotal role of the health care issue in comparison with other major sources of assessments of Obama is confirmed by the equations in Table 18.2.

TABLE 18.2

Source of Opinions of Barack Obama

	1. OLS Regression		2. Logit	
	Coefficient	Effect	Coefficient	Effect
Party identification (7-point scale)	.06** (.02)	.36	.21** (.08)	.29
Ideology (5-point scale)	.05 (.03)	.20	.21 (.14)	.20
Voted for Obama	.39*** (.09)	.87	.70* (.29)	.41
Voted for McCain	-.48*** (.09)		-1.08** (.36)	
White	-.28*** (.06)	.28	-.63* (.27)	.15
Opinion of the Tea Party (5-point scale)	-.15*** (.03)	.60	-.48*** (.11)	.43
Opinion of the health care bill (5-point scale)	.33*** (.06)	1.32	.79*** (.10)	.64
Efficacy of the stimulus bill (4-point scale)	.22*** (.03)	.66	.67*** (.13)	.44
Constant	.38*** (.07)		-.92 (.56)	
Adjusted R ² /Pseudo R ²	.74		.67	
Log Likelihood			-220.4	
Number of observations	1,033		971	

Note: The dependent variable in the OLS equation is a 5-point scale ranging from 2 (very positive view of Obama) to -2 (very negative view of Obama); in the logit equation it takes a value of 1 respondent approved of Obama's job performance, 0 if disapproved; party identification scored in the Democratic direction; ideology is scored in the liberal direction; the presidential vote variables and "white" are 1 if yes, 0 otherwise; opinion on the Tea Party movement is a 5-point scale ranging from 2 (very positive) to -2 (very negative); opinion on health care reform is a 5-point scale (2 = good idea, strongly; 1 = good idea, not so strongly, 0 = unsure or no opinion; -1 = bad idea, not strongly; -2 = bad idea, strongly); efficacy of the stimulus is a 4-point scale, (2 = has helped the economy, 1 = will eventually help the economy, 0 = unsure, -1 = will not help the economy). Robust standard errors are in parentheses.

For the OLS equation, effect is the estimated difference in the dependent variable between the highest and lowest values of the independent variables; for the logit equation, it is the difference in the probability of approving Obama's performance between the highest and lowest values of the dependent variable with the other variables set at their mean values.

Source: NBC News/Wall Street Journal Poll, May 6-10, 2010, courtesy of the Roper Center, University of Connecticut.

The May, 2010, NBC News/Wall Street Journal poll asked respondents to rate their feelings toward various public figures and institutions, including Barack Obama and the Tea Party movement, as very positive, somewhat positive, neutral, somewhat negative, or very negative. It also asked opinions on the health care bill and the efficacy of the stimulus bill, how the respondent voted in the

2008 presidential election, and the standard party identification, ideology, and demographic questions. Opinion on the health care bill is the strongest predictor of feelings about Obama of any of these variables (Equation 1). This is not surprising, for the simple correlation between feelings about Obama and health care reform, .79, is noticeably higher than for any other pairing, including party identification (.65) and the two 2008 vote variables (.66 each). The same result appears when approval of Obama's job performance is the (now dichotomous) dependent variable and the model is estimated using logistic regression (Equation 2); views on the health care bill have by far the largest estimated effect on the respondent's probability of approving. The equations show that opinions of Obama in 2010 were also strongly related to the reported 2008 presidential vote,²⁷ opinions of the Tea Party movement, and assessments of the efficacy of Obama's stimulus bill.

The causal arrows here clearly run in both directions, so these equations are intended to assess the relative strength of relationships rather than to provide structural estimates of a causal process. They do, however, demonstrate that attitudes toward Obama reflect far more than mere partisanship and ideology, and they point to some of the underlying sources of the highly polarized responses to the Obama presidency. For example, among the approximately one-quarter of respondents who viewed the health care legislation positively and the Tea Party movement negatively, 98% approved of Obama's job performance and 96% viewed him positively. Among the similarly sized faction who expressed negative opinions of health care reform and positive opinions of the Tea Party, 96% disapprove of Obama's job performance and 90% viewed him negatively.

Losing the Independents

A third crucial aspect of health care reform politics is that a solid majority of independents rather consistently sided with Republican identifiers in opposing the bill as too intrusive and too expensive.²⁸ In surveys taken in 2010, an average of 37% of independents favored the legislation, 52% opposed. In aggregate, independents' views of health care reform and Obama converged (Figure 18.5) and not at a level that was helpful to Obama and his party. Obama's decline in support was particularly noticeable among conservative independents, many of whom adopted the Tea Party's view of him as an extreme liberal. As Figure 18.6 shows, just before his inauguration, and regardless of their own ideological locations, independents surveyed by the NBC News/*Wall Street Journal* Poll placed him on average between 2 and 3 on a 5-point liberal-conservative scale (on which 1 is very liberal, 2, somewhat liberal, 3, moderate, 4, somewhat conservative and 5, very conservative). A year later, conservative independents were placing him on the far left end of the scale. As a consequence, their feelings toward him (measured on a scale where 5 is very positive, 4, somewhat positive, 3, neutral, 2, somewhat negative, and 1, very negative) became much more negative. Obama's loss of support among independents is the most politically consequential change in public opinion during his first two years in office, a point I return to in discussing the 2010 elections.

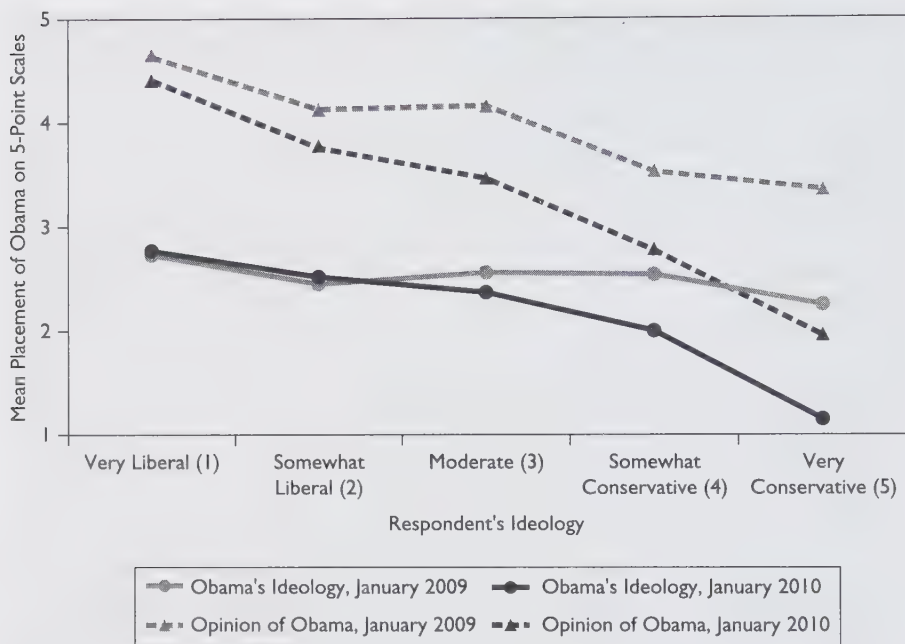


FIGURE 18.6

Independents' Ideological Placements and Opinions of Obama, 2009 and 2010.

Source: NBC News/Wall Street Journal Polls of January 9–12, 2009 and January 10–14, 2010, available courtesy of the Roper Center, University of Connecticut.

OBAMA'S WARS

Obama inherited two ongoing wars and so never had the option of attending exclusively to the economy and other domestic policy issues. Popular disaffection with the Iraq War had contributed crucially to Barack Obama's nomination and election in 2008 (Jacobson 2009a; 2010a). On assuming office, Obama proceeded to fulfill his campaign promise to wind down that war and redirect forces to fighting the resurgent Taliban in Afghanistan. Both moves enjoyed broad public backing. Partisan divisions on Obama's conduct of the wars have been much smaller than on domestic policy (Figure 18.7), no doubt because his policies toward both have pleased Republicans as much (Iraq) or more (Afghanistan) than Democrats. The draw-down of U.S. forces in Iraq follows a timetable negotiated by the Bush administration and is consistent with Republicans' assessment of Bush's "surge" of 2007–2008 as a great success, so their opposition has been muted. Although Democrats tend to prefer a hastier exit (explaining their tepid approval ratings of Obama's performance in this domain), they can at least see a trajectory that should finally extract the United States from what most of them now judge a disastrously misconceived venture (Jacobson 2010b).

Obama's Afghan policies have divided partisans internally. For example, Republicans' support for his December 2009, decision to commit another 30,000 U.S. troops to the fight averaged 70% in polls taken in the months after it was

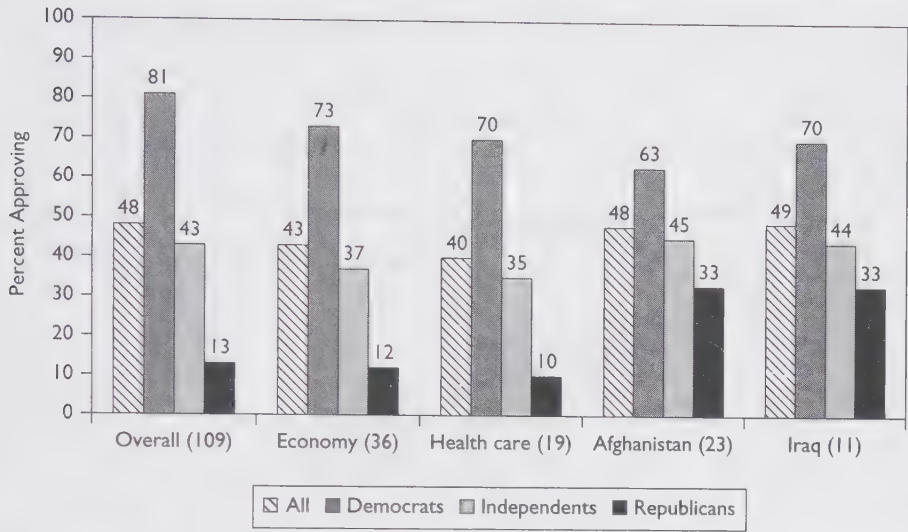


FIGURE 18.7

Partisanship and Approval of Barack Obama's Performance in 2010, by Domain.

Note: The number of surveys averaged is in parentheses.

Sources: ABC News/Washington Post, CBS News/New York Times, NBC News/Wall Street Journal, Gallup, Quinnipiac, CNN, Pew, Ipsos, Newsweek, Marist, and Franklin and Marshall polls.

announced, 33 points higher than their approval of his handling of the Afghan war, while Democrats' approval of the escalation averaged 49%, 14 points lower than their approval of his handling of the war (Jacobson 2010b). Thus, many Republicans approved of the president's decisions but not his handling of the war, whereas many Democrats approved of his handling of the war but not his decisions. In neither case, however, did opinions on Obama's performance in this domain (or regarding Iraq) have an appreciable effect on his overall approval ratings.

As the data in Figure 18.7 show, Republican approval of Obama's general job performance averaged 20 points lower than their approval of his handling of the wars, while Obama's overall approval among Democrats averaged 18 and 11 points higher than his respective ratings on Afghanistan and Iraq. In sharp contrast to evaluations of his predecessor, then, overall assessments of Obama's performance have so far reflected reactions to his domestic far more than his foreign policies, a natural consequence of both his legislative agenda and the recession's severity. Thus, the domain provoking the least partisan contention has not been sufficiently salient to dampen partisan differences in overall evaluations of his presidency.

OBAMA AND THE DEMOCRATIC PARTY

The failure of Obama's legislative and other policy achievements to deliver any tangible political dividends and continuing economic discontent affected not only his own popular standing, but also that of the Democratic Party. Presidents have a powerful effect on popular attitudes toward their parties

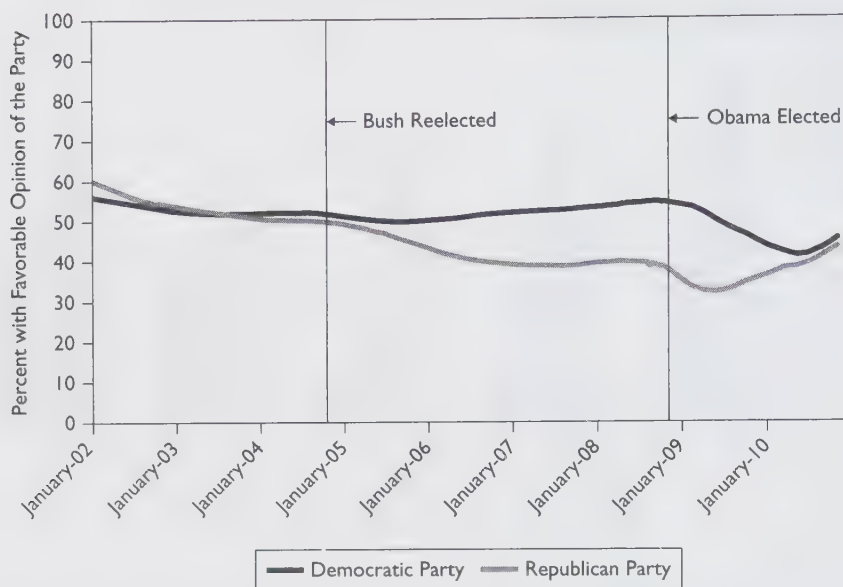


FIGURE 18.8
Party Favorability, 2002–2010.

Sources: Lowess-smoothed trend from 187 CBS News/*New York Times*, Gallup, Quinnipiac, Fox News, Pew, Ipsos, ABC News/*Washington Post*, Bloomberg, and CNN polls.

(Jacobson 2009b); one of Bush's signal contributions to Democratic victories in 2006 and 2008 had been the damage done to the Republican Party's popular standing during his second term. By the time Obama took over, his Democrats enjoyed a wide lead in party favorability (Figure 18.8).²⁹ Since then, Republican favorability has undergone a modest rebound from its low point in early 2009, while views of the Democratic Party have become substantially less favorable. The average 23-point advantage Democrats held on this dimension during the first quarter of 2009 had by the final quarter of 2010 fallen to 2 points.

As with Bush, the data show a strong linear relationship between aggregate views of Obama and his party. Figure 18.9 plots party favorability against presidential approval during the two administrations and displays equations estimating the linear relationship between the two variables, also plotted in the figure. Note that the slope has been steeper during the Obama administration; the difference is statistically significant ($p < .001$), another sign of Obama's unusual centrality to the organization of public opinion during his presidency.³⁰ Also as with Bush (Jacobson 2009b), Obama's popularity had a much smaller effect on favorability ratings of the opposing party. Regressing Republican favorability on Obama's approval rating produces a coefficient of $-.24$ (standard deviation, $.12$) and the fit is quite poor (adjusted $R^2 = .05$). Presidents who lose popularity hurt their own party's standing, but they do not help the opposition party's standing to nearly the same degree.

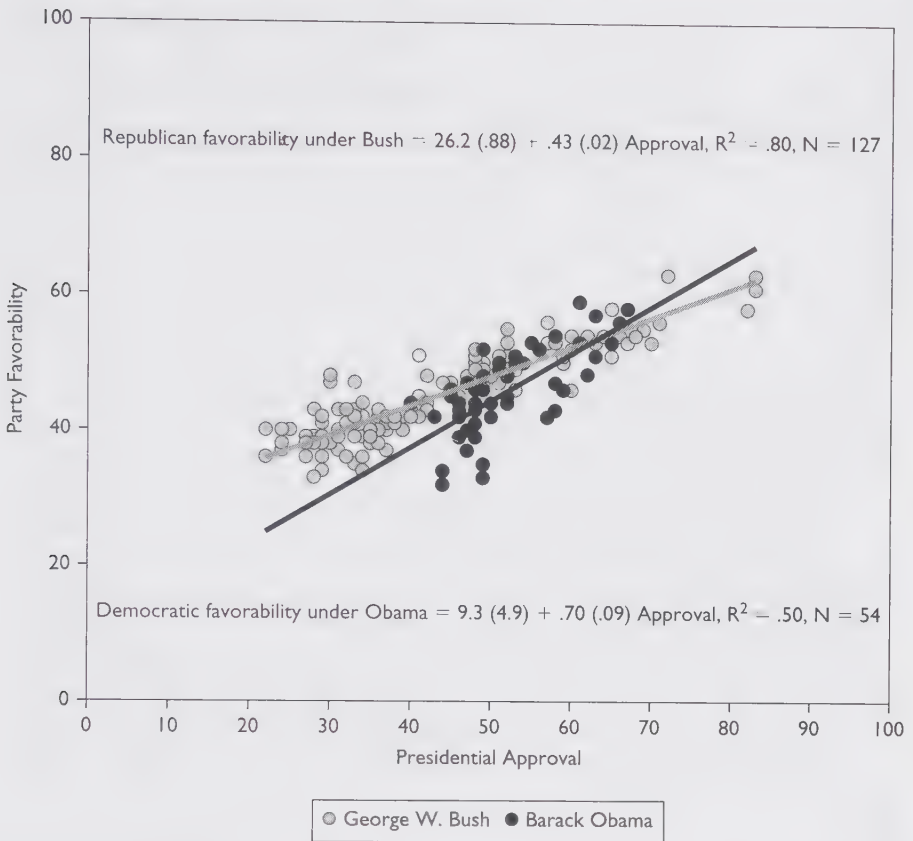


FIGURE 18.9

Presidential Approval and Party Favorability, G. W. Bush and Obama Administrations.

Trends in macropartisanship (the aggregate share of partisans identifying with the parties) have also been found to track aggregate presidential approval (Erikson, MacKuen, and Stimson 1998; Green, Palmquist, and Schickler 1998; Jacobson 2009b; MacKuen, Erikson, and Stimson 1989), and this remains true for the Obama administration. Both the CBS News/*New York Times* and Gallup party identification series show that Bush's declining approval ratings during his second term were reflected in an increasingly Democratic mass electorate (Figure 18.10). That trend was reversed early in Obama's presidency and by the end of his second year in office, all of the Democrats' gains in the Gallup series, and most of the gains in the CBS/*New York Times* series, had been erased. Treating independents who say they lean toward a party as partisans does not alter the picture, although their inclusion tends to exaggerate the degree of change. As with party favorability, macropartisanship is directly related to presidential approval during both the Obama and Bush administrations (Figure 18.11). Again, the slope is steeper for Obama, although in this instance the difference is not statistically significant.

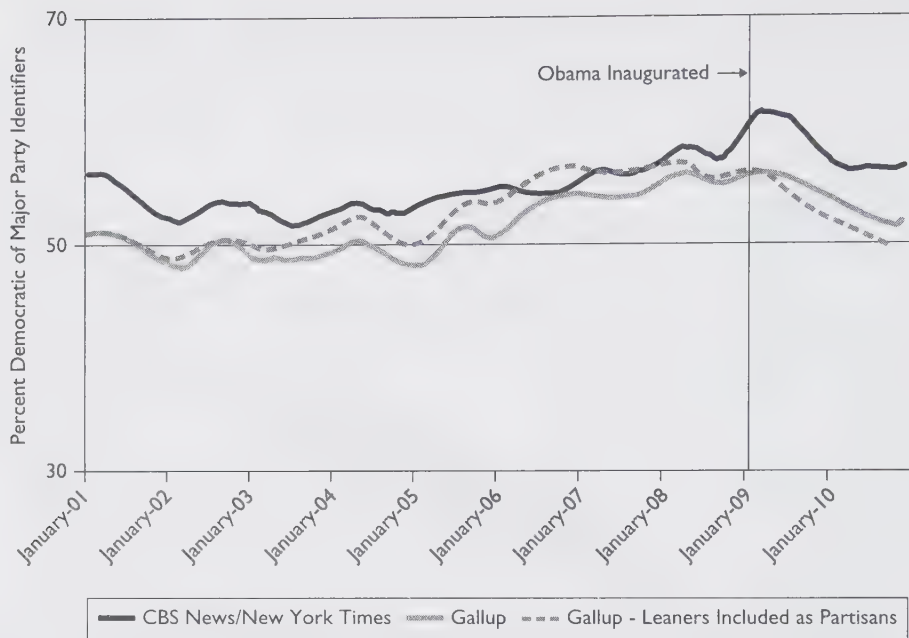


FIGURE 18.10

Macropartisanship, 2001–2010.

Source: Lowess-Smoothed trends from 167 CBS News/*New York Times* polls and 299 Gallup polls.

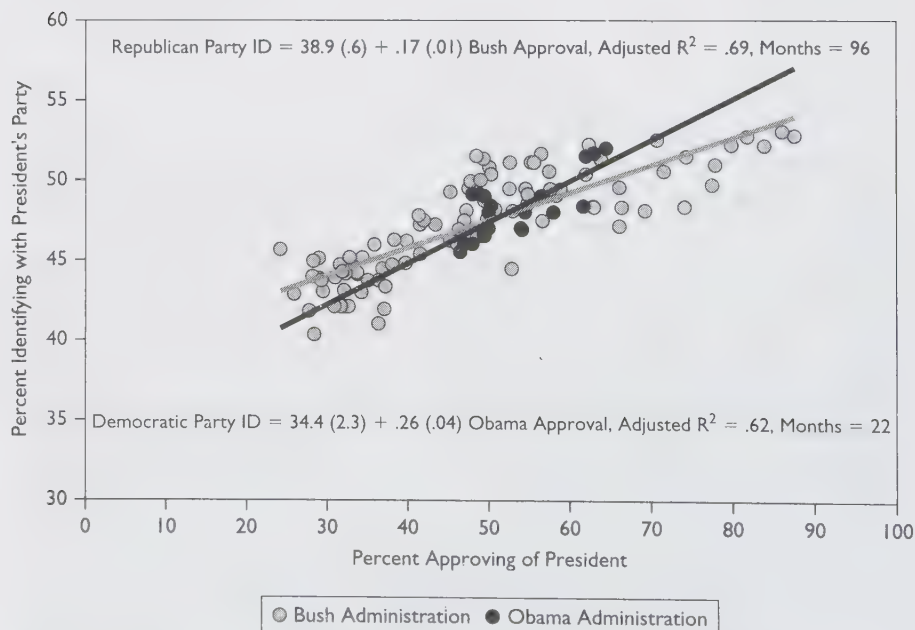


FIGURE 18.11

Presidential Approval and Macropartisanship, George W. Bush and Barack Obama Administrations (Monthly Averages).

THE 2010 MIDTERM ELECTIONS

The accumulated consequences of lingering high unemployment and the failure of Obama's legislative and policy accomplishments to generate political benefits inflicted severe damage on the Democratic Party in the 2010 midterm elections. The referendum component common to all midterm elections was strengthened in 2010 by Obama's emergence as an unusually powerful anchor for political opinions. The proportion of respondents saying their congressional vote would be cast to support or oppose the president, 56%, was the highest for any of the nine midterms for which data are available (Jacobson 2011c).³¹ The balance of supporting (27%) and opposing (29%) voters was nearly even, but Obama's opponents were much more eager to participate in the election: on average, 63% of Republicans said they were more enthusiastic about voting than usual (the highest proportion of such voters recorded in midterm data going back to 1994), compared with 44% of Democrats (Jacobson 2011c). And Obama's Tea Party antagonists were the most enthusiastic participants of all.

Analysis of aggregate election data confirms that the 2010 election was nationalized to an extraordinary degree and that the president was the primary focus. For example, the relationship between the midterm House vote and the president's district-level vote in the previous election was the closest on record. This relationship has been growing stronger for decades (Figure 18.12), but 2010 produced, by a considerable margin, the highest correlation in the series,

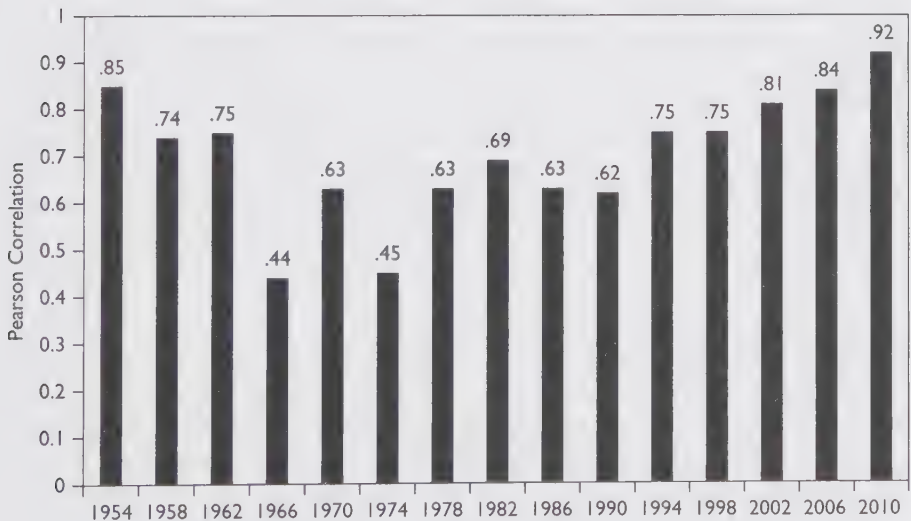


FIGURE 18.12

Correlation Between the Prior Presidential Vote and the Midterm Election Vote Across House Districts, 1954–2010.

Source: Compiled by author.

.92, compared to .85 and .84 for the two next-highest midterms (1954 and 2006). The same statistic for 2010 Senate elections calculated from state-level data, .84, was also highest among midterms going back to Dwight E. Eisenhower's first term. To an extraordinary degree, then, how well Democratic candidates did in 2010 depended on how well Obama had done among their constituents in 2008. The interelection swing in the House vote between 2008 and 2010 was also more uniform across districts than usual, and estimates of the incumbency advantage were the smallest since the 1960s (Jacobson 2011c). All evidence, then, identifies 2010 as the most nationalized midterm election in at least six decades.

With high unemployment and widespread popular discontent about the direction of the country,³² a highly nationalized election obviously favored the Republicans. Shifts in the structure of electorate between 2008 and 2010 also worked to the Republicans' advantage. Obama had attracted unusually high turnout among younger and minority voters in 2008, demographic categories that include a disproportionate share of marginally involved citizens with a lower propensity to vote in midterm elections, setting up a classic "surge and decline" scenario (Campbell 1966). As noted earlier, the balance of party identifiers had also shifted in the Republicans' favor since Obama's inauguration (Figure 18.10), and independent voters, essential to Democratic victories in 2006 and 2008, had turned against the president (Figures 18.5 and 18.7). Both changes clearly hurt the Democrats. According to the exit polls, party-line voting was very high (at 94% for Republicans, 92% for Democrats) in 2010, underlining the significance of the shift in mass partisanship. More crucially, independent House voters, who had split 57-39 for the Democrats in 2006 and 51-43 in 2008, voted for Republicans, 56-37 in 2010 (Jacobson 2011c). A comparable shift occurred in Senate elections. According to the 2008 exit polls, seven of the eight Democrats who took Senate seats from Republicans that year had outpolled their opponents among independents; in 2010, all of the Republicans who took seats from Democrats were supported by majorities of independents.³³ The failure of Obama and his party to maintain their appeal to independent voters was the single most important source of the Democrats' losses in 2010.

CONCLUSION

During his first two years in office, in fulfillment of prominent campaign promises, Barack Obama pushed through landmark legislation attacking the recession and its causes, initiated sweeping reforms in the health care system, and shifted U.S. forces from Iraq to Afghanistan. The public's response was to hand his party a decisive defeat in the 2010 midterm election, leaving him to face a hostile Republican majority in the House and sharply diminished Democratic majority in the Senate for the final two years of his term. The political failure of Obama's legislative and policy successes had multiple sources. The most important was that the economy did not rebound strongly enough to make a significant dent in the unemployment rate. The main benefits of TARP

and the stimulus legislation lay in keeping the economy from getting much worse, but the counterfactual (how much more severe the recession would have been without these actions) did not carry much force against the reality of a painfully slow recovery, and most Americans came to see these policies as ineffective or even harmful. The survey respondents identifying the beneficiaries of “the government’s economic policies since the recession began in 2002” who placed large banks and financial institutions (74%) and large corporations (70%) far ahead of poor people (31%), middle-class people (27%), and small businesses (23%) could hardly be faulted³⁴; stock prices and corporate profits rebounded (arguably, a necessary step toward more general prosperity), but the benefits have been slow to trickle down to middle- and working-class Americans. Similarly, health care reform may someday be celebrated like other major New Deal-type programs, such as Social Security and Medicare, but its immediate political effect was to polarize the public and inspire the upsurge of populist conservatism and intense hostility to Obama manifest in the Tea Party movement. His foreign policy decisions were less controversial and divisive, but they were not central to the public’s evaluation of this president.

Could Obama and his allies have done anything to produce a more positive response from the public to his initiatives? Perhaps at the margins, but realities beyond his control place severe constraints on any president’s ability to move the public (Edwards 2009), and Obama is no exception. It was not for want of his “going public” that his health care reforms were not more popular. Aside from the straitened times that curb generosity, there was also the problem that, even if they care about the uninsured and worry about rising costs, most Americans are satisfied with their own medical arrangements and skeptical that changes will improve them. Obama could hardly have avoided addressing the issue, given its prominence in his campaign; and had he tried to do so, his own partisans would have felt betrayed. The administration might have managed congressional action on the legislation more effectively, but there would have been no tidy way to get around the implacable Tea Party-infused Republican opposition in the Senate.

The recession Obama inherited was probably more severe than he and his advisors anticipated, and a larger and better-focused stimulus bill might have been more effective. But it is doubtful he could have gotten pushed through the Congress, and public fears about the mounting deficit limited subsequent options for boosting consumer demand and job formation. In any case, it is difficult to imagine any feasible government action that would have significantly accelerated the recovery during Obama’s first two years, if only because the devastated housing market admitted to no quick fix, and the international economy was also plagued by the legacy of the banking and housing crises.

Opinions of Obama were sharply divided along partisan and ideological lines even before he took office, reinforcing congressional Republicans’ reflexive instincts to oppose and obstruct. The Tea Party view of the president also preceded his election, so almost any domestic action consistent with his position as a moderately liberal Democratic president was likely to provoke the wrath of the McCain voters and other populist conservatives who considered

him a radical leftist. And Fox News, Rush Limbaugh, and company were in business to make sure that it did.

In short, even if Obama had been a more astute politician and effective advocate for his policies, conditions prevailing during his early presidency suggest that he would still have faced a jobless recovery and intractable opponents and that he and, by extension, his party would still have suffered a serious erosion of public support. Conditions may or may not improve for Obama during the remainder of his term (even if the economy picks up steam, the problem of Afghanistan looms), but his ability to recover popular support and revive his party's fortunes will continue to be constrained by circumstances he cannot control.

REFERENCES

- Ansolabehere, Stephen. 2009a. *Cooperative Congressional Elections Survey, 2008: Common Content*. [Computer File] Release 1: February 2, 2009. Cambridge, MA: M.I.T. [producer].
- . 2009b. "Guide to the 2008 Cooperative Congressional Elections Survey," February 9 draft. Harvard University, Cambridge, MA.
- Barstow, David. 2010. "Tea Party Lights Fuse for Rebellion on Right." *New York Times*, February 16.
- Campbell, Angus. 1966. "Surge and Decline: A Study of Electoral Change." In *Elections and the Political Order*, eds. Angus Campbell, Philip E. Converse, Warren E. Miller, and Donald E. Stokes. New York: John Wiley and Sons, 42–60.
- Conroy, Scott. 2008. "Palin: Obama's Plan Is 'Experiment with Socialism.'" *CBS News*, October 19. http://www.cbsnews.com/8301-503443_162-4532388.html.
- Congressional Budget Office (CBO). 2010. "Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from April 2010 through June 2010," August Report. <http://www.cbo.gov/publications/collections/collections.cfm?collect=12>.
- Drogan, Bob, and Mark Barabak. 2008. "McCain Says Obama Wants Socialism." *Los Angeles Times*, October 19.
- Edwards, George C. III. 2009. *The Strategic President: Persuasion and Opportunity in Presidential Leadership*. Princeton, NJ: Princeton University Press.
- Erikson, Robert S., Michael MacKuen, and James A. Stimson. 1998. "What Moves Macropartisanship? A Response to Green, Palmquist, and Schickler." *American Political Science Review* 92 (December):901–21.
- Green, Donald, Bradley Palmquist, and Eric Schickler. 1998. "Macropartisanship: A Replication and Critique." *American Political Science Review* 92 (December):883–99.
- Jacobson, Gary C. 2008. "George W. Bush, Polarization, and the War in Iraq." In *The George W. Bush Legacy*, eds. Colin Campbell, Bert A. Rockman, and Andrew Rudalevige. Washington, DC: CQ Press, 62–91.
- . 2009a. "The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority." *Political Science Quarterly* 124 (Spring 2009): 1–30.
- . 2009b. "The Effects of the George W. Bush Presidency on Partisan Attitudes," *Presidential Studies Quarterly* 39 (June 2009):172–209.
- . 2010a. "George W. Bush, the Iraq War, and the Election of Barack Obama," *Presidential Studies Quarterly* 40 (June 2010):207–24.
- . 2010b. "A Tale of Two Wars: Public Opinion on the U.S. Military Interventions in Afghanistan and Iraq," *Presidential Studies Quarterly* 40 (December 2010): 585–610.
- . 2011a. *A Divider, Not a Uniter: George W. Bush and the American People*, 2nd ed. New York: Pearson Longman.
- . 2011b. "The Obama and Anti-Obama Coalitions." In *The Barack Obama Presidency: First Appraisals*, eds. Bert A. Rockman and Andrew Rudalevige. Washington, DC: Congressional Quarterly Press, forthcoming.

- . 2011c. "The Third Wave: The Republican Resurgence in 2010," *Political Science Quarterly* 126 (Spring), forthcoming.
- Kenski, Kate, Bruce W. Hardy, and Kathleen Hall Jamieson. 2010. *The Obama Victory: How Media, Money, and Message Shaped the 2008 Election*. New York: Oxford University Press.
- MacKuen, Michael, Robert S. Erikson, and James A. Stimson. 1989. "Macropartisanship." *American Political Science Review* 83 (December):1125–42.
- Parker, Christopher S., and Matt A. Barreto. 2010. "Exploring the Sources and Consequences of Tea Party Support." Paper presented at the conference on Fractures, Alliances and Mobilizations in the Age of Obama: Emerging Analyses of the 'Tea Party Movement, Center for the Comparative Study of Right Wing Movements, U.C. Berkeley, October 22.
- Przybyla, Heidi, and John McCormick. 2010. "Poll Shows Voters Don't Know GDP Grew With Tax Cuts," *Bloomberg Businessweek*, October 29. <http://www.businessweek.com/news/2010-10-29/poll-shows-voters-don-t-know-gdp-grew-with-tax-cuts.html>.
- Rooney, Ben. 2010. "TARP Cost Estimate Cut to \$25 Billion, Says CBO," CNN, November 30, 2010. http://money.cnn.com/2010/11/30/news/economy/GAO_TARP_report.
- Sherif, Muzafer, and Carl I. Hovland. 1961. *Social Judgment: Assimilation and Contrast Effects in Communication and Attitude Change*. New Haven, CT: Yale University Press.

ENDNOTES

1. Democrats will have to defend 23 seats, Republicans only 10, in 2012.
2. The American National Election Studies (ANES; <http://www.electionstudies.org>). The ANES 2008 Time Series Study [dataset]. Stanford University and the University of Michigan [producers].
3. Party line voting was also second highest to 2004 in the equally lengthy Gallup Poll series; see <http://www.gallup.com/poll/139880/Election-Polls-Presidential-Vote-Groups.aspx> (accessed December 6, 2010).
4. "Contrast" occurs when people perceive someone they dislike as having opinions more distant from their own than is actually the case; "assimilation" occurs when people perceive someone they like as having opinions closer to their own than is actually the case.
5. According to ANES data, loyalty in the 2008 House elections was the highest since 1962; in Senate elections, it was the highest since 1958; the rate of president-House ticket splitting was second lowest since 1964 (it was slightly lower in 2004); president-Senate ticket splitting was lowest since 1952.
6. The analysis here is confined to districts in which there were at least 10 voters for the winning candidate; this includes 158 Republican districts and 199 Democratic districts. The mean number of Republican voters in the Republican districts in the data set is 27.7, with a standard deviation of 7.9; the mean number of Democratic voters in the Democratic districts in the data set is 25.6, with a standard deviation of 8.8. For a description of the 2008 CCES, see Ansolabehere (2009a; 2009b).
7. Questioned in a July 1–5, 2010, Pew survey, 47% of respondents said it had been Bush's program, 47%, Obama's. Responses did not differ significantly across partisan categories; <http://pewresearch.org/databank/dailynumber/?NumberID=1057> (accessed December 7, 2010).
8. The CBO estimated that the stimulus bill increased the number of full-time-equivalent jobs by between 1.7 million to 3.3 million and the GDP by from 1.7 to 4.5% compared to what would have occurred without the stimulus (CBO 2010). "Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output From April 2010 Through June 2010," August 2010, <http://www.cbo.gov/publications/collections/collections.cfm?collect=12>.

9. The breakdown on the question (increase vs. decrease in taxes) was 55-3 for Republicans, 31-7 for independents, and 19-13 for Democrats; thus even Democrats were more likely to get it wrong than right. See the CBS News/*New York Times* Poll, September 10–24, 2010, http://www.cbsnews.com/8301-503544_162-20016602-503544.html?tag=contentMain;contentBody.
10. In the August 27–30 Gallup Poll, for example, 61% of Americans approved of the legislation, including 76% of Democrats, 62% of independents, and 42% of Republicans (from my secondary analysis of the survey provide by the Roper Center, University of Connecticut).
11. In the survey reported in Table 18.1, 20% said they did not know if the legislation hurt or helped the country, and another 37% said it was too soon to tell.
12. In the 11 surveys taken between March 2009 and August 2010, asking if Obama or Bush were more to blame for the economy, an average of 25% blamed Obama, 54%, Bush. In the six surveys including Wall Street and Congress as potential culprits, an average of 5% blamed Obama, 33%, Bush, 24%, Wall Street, and 13%, Congress. Only in the first series was there a modest increase in blaming Obama over time. The first series is from polls conducted by ABC News/*Washington Post*, NBC News/*Wall Street Journal*, Fox News, Quinnipiac, *Newsweek*, Democracy Corps, National Public Radio, and *Time*; the second series is from CBS News/*New York Times* and Fox; data are reported at <http://www.pollingreport.com> and the sponsors' Web sites.
13. Monthly unemployment and Obama's average approval rating correlate at $-.92$ over his first 12 months in office.
14. Google "Obama" in conjunction with any of these labels to see how routinely they are used—and defended—on the Internet.
15. In 19 surveys taken between January and October 2010, between 18 and 41% said they had a favorable view of the Tea Party movement (average, 32%), and from 12 to 50% had an unfavorable view of it (average, also 32%); the rest were uncertain or did not know enough about it to have an opinion; from NBC News/*Wall Street Journal*, CBS News/*New York Times*, Quinnipiac, Fox News, AP-GfK, and ABC News/*Washington Post* polls available at <http://www.pollingreport.com/politics.htm> (accessed November 7, 2010).
16. Only 7% of Tea Party supporters in the April 5–12 CBS News/*New York Times* Poll approved of Obama's performance; 88% disapproved, and 92% said his policies were leading the country toward socialism; see "Tea Party Movement: What They Think," http://www.cbsnews.com/htdocs/pdf/poll_tea_party_041410.pdf (accessed April 15, 2010).
17. "Polls: 'Birther' Myth Persists Among Tea Partiers, All Americans." http://www.cbsnews.com/8301-503544_162-20002539-503544.html?tag=contentMain;contentBody (accessed April 15, 2010); the February ABC News/*Washington Post* Poll found 31% of Republicans and a like proportion of Tea Party sympathizers believing Obama was not U.S. born; see <http://abcnews.go.com/PollingUnit/poll-half-birthers-call-suspicion-approve-obama/story?id=10576748&page=2>; asked in a July, 2010 survey if Obama was born in the United States, only 23% of CNN's Republican Respondents said "definitely," 34% said "probably," 2% said "probably not," and 14% said "definitely not." The respective percentages for Democrats were 64, 21, 7, and 8; results at <http://i2.cdn.turner.com/cnn/2010/images/08/04/rel10k1a.pdf> (accessed August 4, 2010).
18. "Growing Number of Americans Say Obama Is Muslim," Pew Survey Report, August 19, 2010, <http://people-press.org/report/645/>.

19. Eleven percent of Democrats and 17% of independents also thought he was a Muslim; *Time Magazine*/Abt SRBI Poll: Religion, August 16–17, 2010, available from the Roper Center, University of Connecticut; secondary analysis by the author.
20. *Newsweek* Poll, August 25–26, 2010, <http://nw-assets.s3.amazonaws.com/pdf/1004-ftop.pdf>.
21. “Boehner: It’s ‘Armageddon,’ Health Care Bill Will ‘Ruin Our Country,’” The Speaker’s Lobby, Fox News, March 20, 2010, <http://congress.blogs.foxnews.com/2010/03/20/boehner-its-armageddon-health-care-bill-will-ruin-our-country/comment-page-3/?action=late-new>.
22. Speech on the House floor, March 21, 2010, <http://vodpod.com/watch/3280104-devin-nunes-health-care-the-ghost-of-communism-a-socialist-utopia>.
23. Typically, most people favor requiring insurance companies to cover preexisting conditions and to continue to cover people who become sick, providing subsidies so that poor families can buy insurance, and requiring employers to provide health insurance to workers. The idea of universal coverage also generally wins majority support. But majorities also tended to oppose the components necessary to pay for these features: taxing the most generous health care policies, limiting some Medicare reimbursements, and requiring everyone to buy health insurance (so that the risk pool is large enough) and enforcing this requirement through fines; see the extensive compilation of survey questions and responses at <http://www.pollingreport.com/health.htm> (accessed November 10, 2010).
24. For Figure 18.3, job approval appears as lowess-smoothed trends from 224 surveys taken by ABC News/*Washington Post*, CBS News/*New York Times*, CNN, Gallup, *USA Today*, Ipsos, NBC News/*Wall Street Journal*, *Newsweek*, Pew, and *Time*. Opinions on health care reform are lowess-smoothed trends from 74 ABC News/*Washington Post*, CNN, Gallup, *USA Today*, Ipsos, NBC News/*Wall Street Journal*, Pew, Quinnipiac, Kaiser Family Forum, and *Newsweek* polls. Data were acquired from <http://www.pollster.com>, <http://www.pollingreport.com>, and the polling organizations’ Web sites.
25. An average of 90% of Republicans, 88% of Democrats, and 82% of independents offered consistent evaluations; analysis is based on 10 surveys by Gallup, NBC News/*Wall Street Journal*, and CNN taken between February and August and available for secondary analysis from the Roper Center, University of Connecticut.
26. In the June 2010 Pew survey, 88% of respondents gave consistent evaluations of Obama’s performance on health care and his overall job performance; on eight other issues, including the economy, the deficit and the Iraq and Afghan wars, consistency ranged from 69% to 85%.
27. The relationship could be inflated by faulty memories, but the distribution of the reported two-party vote (54.9% for Obama, 45.1% for McCain) is very close to actual vote in 2008 (53.7% to 46.9%).
28. “Obama Gets Small Bounce from Health Care Win, Quinnipiac University National Poll Finds; Net Disapproval Drops 9 Points,” <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1437>, (accessed March 27, 2010).
29. Party favorability is measured by the proportion of respondents who reply “yes” when asked, “Do you have a favorable or unfavorable view of the Republican [Democratic] Party?”
30. The slope from analysis of comparable data from the Clinton administration was .49 (standard error, .12, adjusted $R^2 = .35$, $N = 29$), so this cannot be attributed to the difference between Republican and Democratic presidents.

31. Second highest was George W. Bush in 2006, at 54%; for other presidents going back to Ronald Reagan in 1982, it has ranged from 34% to 47%.
32. During 2010, the proportion of Americans believing the country was on the wrong track exceeded the proportion believing it was moving in the right direction by a ratio of more than 2 to 1. See http://www.huffingtonpost.com/2009/01/07/issue-rdwt_n_725763.html (accessed December 4, 2010).
33. The 2008 results are at <http://www.cnn.com/ELECTION/2008/results/polls.main> (accessed November 26, 2010); the 2010 results are at <http://www.cnn.com/ELECTION/2010/results/polls.main> (accessed November 26, 2010). There was no exit poll covering one of the Republican pickups (North Dakota), but John Hoeven won 76% of the vote overall so it is safe to assume he also took a majority of independents.
34. "Gov't Economic Policies Seen as Boon for Banks and Big Business, Not Middle Class or Poor," Pew Survey Report, July 19, 2010, <http://people-press.org/report/637>.

Reading 19

The Presidency and Image Management: Discipline in Pursuit of Illusion

JEREMY D. MAYER

"Presidential government is an illusion. . . ." Heclo and Salamon (1981, 1).

Scene One: A triumphant president lands in a jet on an aircraft carrier, to celebrate with loyal troops a stunning victory over a tyrannical despot. The sailors greet him with boisterous cheering, and he gives a speech from the deck as the sun sets perfectly in the Pacific, the last golden rays of the sun illuminating a patriotic banner reading "Mission Accomplished."

Scene Two: In the midst of a photo opportunity with Florida second-graders about reading, a president is told in whispers by his chief of staff that the second tower at the World Trade Center has been hit by a terrorist attack. As two other hijacked planes speed toward Washington, the confused president picks up "The Pet Goat" and stays on photo-op autopilot for at least seven long minutes, chatting about goats and literacy (Paltrow 2004).

These two images of the same president, George W. Bush, illustrate the challenges of presidential image management in the 24-hour video era. One shows the president in a carefully planned setting of patriotism, victory, masculinity, and daring. The other shows a president taking no actions, making no decisions, as crucial minutes tick away. The Bush administration's success

at image management is demonstrated by the fact that most Americans saw the unprecedented carrier landing, while almost none viewed the complete footage of Bush complimenting Ms. Daniels's children on their reading abilities while the towers burned.

The image of the president—the impression Americans have of their chief executive as a leader and a human being—is vitally important to the success of any modern president. Public views about their leaders' personal characteristics have been part of successful governance since before the Athenian age of Pericles, and certainly pervade the long history of the American presidency. Image has become more central to the presidency in the decades since television became the primary mode of political communication. Image is both a source of power and a measure by which presidents and their staffs are judged. This essay will briefly explore how presidential images are created and assess how the Bush image managers are doing at their task. It will conclude by raising questions about the future of presidential image management.

THE COMPONENTS OF PRESIDENTIAL IMAGE

What is image? It is both truth and lie, both accurate perception and the gap between reality and perception. It is not policy or substance. It is, however, connected to both. Image is built up day by day, slowly accreting sediment at the bottom of the lake of public opinion. Images can be startlingly resilient, in part because of the media's tendency to reinforce whatever the public image has become. At a certain point in a presidency, it becomes easier to change policy than it is to change image, for this very reason. As one of the great presidential image managers, Reagan aide Michael Deaver, observed, "in the television age, image sometimes is as useful as substance" (Waterman, Wright, and St. Clair 1999, 53).

The public image of a president is produced in a complex interaction among four elements: the "reality" of the president's character, actions, and policies; the image management of his staff; the attempted redefinitions of his political opponents; and the cacophony of media assessments of the man in the White House. Together, they create the inchoate and shifting image within the collective minds of Americans.

The "reality" that is the supposed root of image begins with the president's character, talents, worldview, and style. It also encompasses, in the no-privacy modern era, such things as family life and sexual behavior. The president's policies and political background are relevant as well, to the extent that they color the public's perception of the president as a man. Policies that are seen as mean spirited, thoughtless, or dangerous have all affected the personal image of presidents. It also includes his physical appearance, as well as his diction and his accent.

Consider how the exigencies of image politics limit who can actually be president. While the American general population is perhaps the most obese

in the world, the last president to be truly overweight was William Howard Taft in 1912.¹ The last bald man elected president was Dwight Eisenhower. Given that estimates of the number of bald or mostly bald men older than 35 in the general public range from 40 to 70 percent, it should astound us that the 16 men who ran for the major party nominations in 2000 and 2004 were all follicularly gifted.² Not one of them was overweight, and the eventual winner in 2000 was remarkably svelte. Washington may be, as one quip has it, Hollywood for ugly people, but at the top, it is now run by people who are quite attractive, or at least not unattractive. If we consider Kennedy the first president of the television age, the trend toward physical attractiveness becomes clear. The last five presidents (Reagan, Bush I, Clinton, Bush II, Obama) are far more attractive than the preceding four (Johnson, Nixon, Ford, Carter). The reality of personal appearance may be the clearest example of the power of image in politics.³

The image manager's task begins with deciding which of these aspects of the president to emphasize and which to submerge. Sometimes, reality must be directly contradicted. A divorced president who has dysfunctional relationships with some of his own children is portrayed as a benevolent father figure (Reagan). A famously unfaithful husband lectures American teenagers about sexual propriety (Clinton). A president raised in wealth and privilege lets it be known that his favorite food is pork rinds and his favorite music is the Oak Ridge Boys (Bush I). The danger of such tactics is that image manipulation that directly contradicts reality may strike the public as fake—a perception corrosive to all future attempts at image repair and manipulation (Waterman et al. 1999, 186). The best image management leaves no traces, no fingerprints of public relations professionalism. Thus, the call to “let Reagan be Reagan” or its equivalent is often heard. The typical protest from image managers is that their job is to let the public get to know the “real” president. In truth, the job is to let the public believe they know the real person.

Political opponents of the president know if they can increase the number of Americans who hold unfavorable impressions of the president as a person, they will have much greater success at defeating his policies. Many observers remark on the increasingly vituperative tone of politics in the nation; the main cause is the emphasis on personal image. Politics became more personal because the personal is far more potent today than ever before. Thus, image politics have had concrete effects. Because so many in both parties have come to believe that the opposition party's leaders are not just wrong on policy but are actually bad people, it is difficult for leaders to reach across the gulf between the parties without potentially alienating core supporters. Campaign finance reform may be to blame. By making parties and candidates dependent on thousands of upper-middle class donors, rather than the ultra-wealthy few, campaign finance reform has forced fundraisers to demonize their opponents. For example, a hypothetical partisan letter emphasizing the positive aspects of Barack Obama's platform would raise much less money than one that disparaged the personalities of John McCain or Sarah Palin. The politics of personal destruction pays as well as plays.

The ability of a White House to maintain a relatively neutral or positive personal image for the president has been changed by these increased incentives for opponents to wage war against the president as an individual. This can be done through a number of different venues. First, changes in the media permit "narrowcasting" messages to partisan groups. When Americans watched three broadly marketed television networks, the need to appear objective and even respectful toward the office of the presidency limited the dissemination of truly egregious and partisan characterizations of the president. Those who seek to distribute a negative image of the president will find many willing viewers on the Internet if not somewhere on cable television.

The media serve as referees of the ongoing fight over the president's image, adjudicating which depictions are credible through their decisions about what to broadcast. The media have also changed their standards as to what is news and what is private. In 1962, a woman picketed outside the White House, carrying a sign stating that John Kennedy was an adulterer and that she had photographic proof. Not a single media outlet broadcast her allegations, or even investigated them, even though many reporters and editors were aware of such rumors, and some knew them to be accurate (Reeves 1997, 242–43). Today, a half-baked, nearly unsourced allegation of adultery is on the Web within a few hours of its emergence, as occurred with John Kerry in 2004. The quality of a president's marriage is widely discussed in parts of the media, down to the sincerity of a kiss between husband and wife (for example, Tipper and Al Gore in 2000, and the media's obsessive interpretations of public physical gestures between Bill and Hillary Clinton). While the partisan press era of the early republic did feature some scandalous assertions about the sexual practices and characters of occupants of the White House, the personalized coverage today is far more intrusive.

Some of the most powerful media shapers of presidential image are not even journalists. The monologues and sketches on *Leno*, *Letterman*, and *Saturday Night Live* are at least as important as the nightly news broadcasts when it comes to the image of our leaders. These shows, which focus on the most simplified aspects of the public face of the president, both influence the presidential image and are perhaps the best barometer of the public's current judgment about him.

These media depictions of presidents and their challengers quickly become hardened into almost irrefutable realities: George W. Bush—dumb; Bill Clinton—leech; Al Gore—wooden prig and serial liar; Bob Dole—old and cold. Through selective reporting, the media's own practices help set these images in concrete. Perhaps the best example of this was Bush I's encounter with a grocery store scanner. Widely perceived as an aloof patrician, Bush found this image particularly damaging when the economy was doing badly in 1990–1992. Bush was alleged by the media to have looked at a checkout laser scanner with the wonder befitting a multi-millionaire insulated from the daily concerns of average Americans—when the economy was in recession. While the first reporter who wrote of Bush's apparent bewilderment was not even there, it quickly became a hardened "fact" repeated endlessly, even by

scholars (Waterman et al. 1999, 61–62). However, a videotape of the event shows Bush was not surprised at all by the scanner, as an apology from the publisher of *The New York Times* conceded (Kurtz 1992).

In a complicated and shifting interaction, these four forces (reality, image management, image attack from the opposition, and the media) shape the image of every president. What methods did the Bush White House use to convince Americans to perceive Bush positively?

THE BUSH IMAGE TEAM: DISCIPLINE AND SET DESIGN

The Bush White House was tremendously successful at image management in his first term. Two components stand out: the message discipline of the White House, and the quality of the set design that served as the backdrop for the president.

Although Bush seldom claimed to have profited from his sterling education, it was unquestionably to his advantage to be our country's first MBA president. Bush ran his administration like a CEO. "This is the most disciplined White House in history," said an admiring Michael Deaver (Auletta 2004). Particularly in its staff conduct and ethos, a White House reflects the values and priorities of the president. Clinton, famously addicted to open-ended debate, had a White House that leaked constantly. Bush, by contrast, was a martinet for loyalty and discipline. Nearly every account of the internal operation of Bush's White House included a testimony to its leak-proof nature (Millbank 2002).

How did Bush manage to do what every president attempts? In addition to his MBA and his obvious administrative talents, Bush was the only modern president to have had a ground-level view of the operations of a White House staff. During his father's term in office, Bush was an informal enforcer of discipline and a loyalty checker (York 2001a). He inspired a tremendous sense of personal loyalty in staffers, as well as some level of intimidation, which worked together to stop self-aggrandizing or policy-based leaking. The Bush White House also wisely limited the number of people who regularly interacted with the press. In previous White House administrations, top aides were frequently made available to give interviews or at least make comments on stories. At the Bush White House, top staffers boasted about being inaccessible to the media. President Bush somehow inspired a selfless White House staff that put his image ahead of their own celebrity (Auletta 2004). Indeed, the men and women of the Bush White House came closer to achieving the ideal "passion for anonymity" than any other recent presidential staff.⁴

The Bush White House was also remarkably successful at convincing the rest of the executive branch to work with the White House on image management. The centrifugal forces of Washington bureaucracies and the personal ambitions of Cabinet secretaries often defeated such efforts in

the past (Maltese 1992). To combat these tendencies, the Bush administration appointed loyalists throughout the communications offices of the various agencies and departments (Kumar 2003a, 384). Adding to the uniformity of positive depictions of the president and his policies was a new level of coordination and control of message with the Republican leadership on Capitol Hill and with linked interest groups.

All of the discipline on image control gives the White House extraordinary ability to force the media to cover the pictures and narratives it provides. If no one from the White House contributes to a negative image of the president, then the media are almost forced to cover the portrait of the president designed for them by Bush's image handlers.

PRESIDENTIAL SET DESIGN

How a president should be shown to the public is the heart of presidential image management. Believing that most Americans will not read a newspaper article on any given day, or perhaps even watch through an entire news story, the Bush staff crafted an image of the president that suited the person flipping channels (Kumar 2003a, 387). The attention to detail, which became legendary, was thus to be expected; if Americans only see one picture of their president each day, it had better be a good one. At some events, wealthy Republican supporters in the shot behind the president were instructed by the advance team to remove their ties, so that an image of normal Americans supporting Bush would be conveyed (Shella 2003). The backdrop was often composed of repetitive slogans, far too small for the live audience to see, but just right for television. Whether there was any marginal "subliminal" effect on the viewer of seeing slogans associating Bush with jobs, security, and strong families was unknown, but it again served the busy channel-shifting American, who got the White House message of the day. As Dan Bartlett, communications director put it:

Americans are leading busy lives, and sometimes they don't have the opportunity to read a story or listen to an entire broadcast. But if they can have an instant understanding of what the president is talking about by seeing 60 seconds of television, you accomplish your goals as communicators (Bumiller 2003).

In pursuit of the perfect video shot, events were scheduled like Hollywood movies, to get the cherished director's "golden hour" of setting sunshine. When the timing or weather prevented this, the staff was known to spend tens of thousands of dollars on renting rock concert quality lighting sets for single televised events (Bumiller 2003).

Perhaps any White House would adopt this strategy today. Surveys suggest that amid the cacophony of the Internet and dozens of cable options, few Americans watch presidential speeches, and even when they do, few retain more than one simple message from a 30-minute speech (Welch 2003, 353). If the public has a bias toward absorbing information through pictures,

then the White House will work to feed that preference. But in Bush's case, it was also an inevitable response to the weaknesses of his presentation of self. Unlike Reagan or Clinton, Bush was a poor public speaker. On rare occasions, he could fill a room with passion and inspire a nation with his vision and courage, as he did in his seminal September 20, 2001, speech to Congress. With a good speech, a supportive audience, and inspiration, Bush was frequently competent. He was, however, at his worst in unscripted interactions with non-supporters. Thus, perhaps the most crucial image-handling decision in his first term was to insulate him as much as possible from questions and conflict (Suskind 2004, 147–48). When Bush held an economic conference in Waco early in his administration, the president “spontaneously” wandered from panel to panel, with his comments prepared for each session. The conference was a Potemkin's village of discourse. Instead of actually discussing the economic issues of the day—as presidents as diverse as Ford and Clinton had done at similar events—the points to be made were pre-screened, the conclusions about the policies already reached before discussions began (Suskind 2004, 269–73). How could there be any debate at this “conference”? Almost all participants were fervent Bush supporters.

Deft awareness of Bush's limitations explains why Bush had fewer solo press conferences than any other recent president (Kumar 2003b). But it went beyond avoiding tough questions from reporters. Bush enveloped himself in a security bubble in all of his public appearances. Those with anti-Bush signs or chanting anti-Bush slogans were relegated to distant areas with the Orwellian title of “free speech zones,” far from television cameras. Although the claim of security was made, Bush supporters with similar-sized signs were permitted to stay on the motorcade route, or outside a presidential event (Lindorff 2003). If the danger were assassination, surely those who wish the president harm would be smart enough to carry a sign that says “Bush-Cheney.” The claim that the post-9/11 security environment required such control of dissent also rings hollow: Bush as governor was known for forbidding protesters outside his mansion in ways no previous occupant had ever done (Baldauf 1999). The picture of Bush confronting a hostile demonstrator or even driving by angry crowds has rarely if ever been on American television. This image management conveyed, wordlessly, subtly, and powerfully, the impression that those who disagreed with the president were irrelevant and weak. They must be fringe elements: they were physically on the outskirts of every presidential event.

BUSH'S TWO MAIN IMAGES: PRESIDENTIAL MEDIA ROLES

What images did the Bush White House convey of the president of the United States? While several were tried—such as First Christian, Racial Uniter, and President CEO—the two major ones were the Average American and the War Leader.

Average American with Common Values

President Bush boasted one of the most elite backgrounds of any president, and was only the second son of a president to become president. As of November 2004, the Bush family name had been on six of the last seven presidential ballots. Bush also had an educational record far above the American norm, or even the average for presidents: Andover, Yale, and a Harvard MBA. Yet this man of such rarefied background successfully sold himself to the public as a man of the people, a person of typical values and simple small-town beliefs.

In part, the reality of Bush made it easy for the image to be conveyed. Even in comparatively harsh accounts of his presidency, the fact that he made time for secretaries, cooks, and others shines through.⁵ Bush did not pretend to dislike intellectuals in order to woo voters. His disdain toward intellectuals, particularly East Coast intellectuals, is one of the most constant themes in Bush biographies, dating back to his time at Yale if not earlier. Unlike his father, who shielded the fact that he spoke French from the press until after his election, Bush gave little evidence of academic gifts in need of hiding. Confronted with questions about the failure to find weapons of mass destruction in Iraq, Bush brushed them aside as of concern only to those in “elite circles”—as if Bush had not spent his life in such circles.

One of the ways Bush demonstrated his everyman status was through his eager and sincere enthusiasm for sports, especially baseball. One of the major image initiatives of the first nine months of his presidency was hosting tee-ball games at the White House. By inviting small children to play an iconic American sport on the lawn of the White House, Bush was sending a simple message, according to a senior administration official:

... tee ball isn't the reason people like him, but it's initiatives like this . . . that show the wholesomeness factor and will allow him to be one of the more successful presidents (York 2001b).

The percentage of Americans who believed that Bush “shares your values” never dropped below 50 percent in his first term, according to Gallup, and often ranged much higher. The cause lay not only with the adroit handling of his image by his staff. Rather, it was also a product of his opponents’ inability to broadcast a consistent counter-image. Those who opposed Bush could never decide whether he was a dumb man pretending to be sophisticated and failing, or if he was a sophisticated man pretending to be dumb for political reasons. It seems likely that Bush’s tendency to fail at subject-verb agreement, to mangle relatively simple words, and to regularly demonstrate an inability to handle nuance served as much to insulate him from the charge of privilege as it did to support the charge that he lacked the intellectual depth some see as vital to the presidency. The best image for a president suits his personality as well as his political needs. Bush clearly believed that he was in many significant ways a typical American, and this lent sincerity to the depiction, regardless of its accuracy.

War Leader

One of the chief constitutional duties of president is to lead the armed forces. Every recent American president has had to deploy the American military into hostile areas. However, the scope and intensity of the conflicts that Bush has launched made it a far more central part of his presidential image, perhaps more so than any president since Roosevelt. As the president during the most significant attack on the country since Pearl Harbor, Bush's image inevitably became mixed with the perception of his handling of military leadership.

Bush put himself into many positive military settings, including the high-profile aircraft carrier landing. When "major hostilities" were ended in Iraq in April of 2003, President Bush's communications staff wanted to arrange a compelling event to celebrate the good news of rapid victory over Iraq. They chose to put the president on an aircraft carrier full of sailors returning from the Mideast. In an unprecedented step, the commander in chief landed on the deck of the carrier in a pilot's uniform; shifting to civilian gear, Bush spoke in front of a banner reading "Mission Accomplished." The entire event was full of the mood of victory and celebration. Some Democrats complained initially about the jingoism and use of the military for partisan purposes, alleging that the event unnecessarily delayed the sailors return to port, and that Bush had been showboating to land by airplane. However, the event was generally viewed as wonderful politics, and evidence of the skill of the White House image team. As television pundit Chris Matthews asked: "Why are the Democrats so stupid to attack the best presidential picture in years?" (Whitney 2003).

The other iconic image of Bush as war president occurred in Thanksgiving of 2003. The president secretly traveled to Iraq to celebrate the classic American holiday with the troops, an act of personal courage given the security situation in Baghdad. The trip resulted in the perfect photo of Bush offering the troops a turkey on a platter. In this dramatic image, most of the tactics of the Bush image management team were on display. Few White Houses would have had the discipline to undertake such a surprising and risky gesture with no leaks. As with Bush's economic conference or the words posted behind him at public events, the turkey on the platter did not actually nourish any living person at the event—a display turkey, it only nourished the president's image at home.⁶ Finally, the military screened all non-Bush-supporting troops out of the event, thus extending Bush's no-dissent bubble even to the overseas environment (Sealey 2004). Had a single soldier challenged the president about weapons of mass destruction, extended deployments, or simply said, "Send me home, Mr. President," all the positive outcomes for the president's image would have evaporated. Instead, the president's standing in polls improved significantly following the trip (Jacobson 2003).

Bush's image as a war leader was an essential aspect of his popularity. Bush hovered just above 50 percent approval in the polls for the first eight months of his presidency. Following the attacks of 9/11, his popularity soared to unprecedented heights and remained lofty for months as he led a successful and remarkably swift and low-casualty invasion of Afghanistan. A few months after the removal of the Taliban, a slow bleed began in his popularity.

Just at the point where it was reaching its pre-9/11 levels, hostilities with Iraq loomed. Once the Iraq war began, Bush's numbers soared again, although not to the heights of September–February 2001–2002. Following that war, once again Bush's numbers began a slow decline (Jacobson 2003). While Americans “rally ‘round the ‘flag’” and the president during any conflict, conflict seemed to be crucial to Bush's popularity.⁷

THE FUTURE OF PRESIDENTIAL IMAGE MANAGEMENT

The centrality of image to the American presidency is likely to grow. We may be only at the dawn of the era of the “short attention-span presidency,” in which substantive policy proposals become entirely props in the pursuit of effective image conveyance. It is difficult to think of a countervailing political, technological, or cultural force that could stop the increasing salience of images to the voting preferences of the American public. In this sense, the gloomy jeremiads of Neil Postman (1985) and other communication scholars appear to have been confirmed in the decades since their baleful predictions were first aired.

Some might agree with Postman that Americans are thus “amusing themselves to death,” the title of Postman's most important book. Will modern presidents pursue gossamer and ephemeral images, at the expense of long-term historical accomplishments? Consider Truman and Eisenhower, the last two presidents before the image became the dominant means of political communication. No American president has been lower in the polls at the end of his term than Truman was in 1953.⁸ Yet despite the image of a country bumpkin too small for the presidency, which he took with him back home to Independence, Missouri, Truman's stock has risen in the esteem of historians in every poll on presidential greatness since 1953. In Eisenhower's case, he was apparently content to let the public think he was less sharp than he actually was, in order to achieve substantive policy goals of moderate conservatism. One might observe that Truman and Eisenhower correctly put their time and efforts into matters of substance. Yet their presidency is not the one George W. Bush was sworn into on January 20, 2001. Image is now so directly linked to the ability to achieve substantive policy goals that tactics such as Eisenhower's may no longer be feasible. Even a president committed to achieving substantive goals will have to follow the logic of image management.

Yet there is another possibility, more hopeful than the inevitable subjugation of substance to image. Critical theorist Walter Benjamin, writing in the 1930s, made two key claims for the virtues of mechanically reproduced images: They would free the masses from elite filters because of the immediacy of their conveyance, and they would reveal previously hidden aspects of life. In the case of one iconic image of George W. Bush—the aircraft carrier shot—we can see evidence of Benjamin's prescience. Although widely viewed at the time as a brilliant exploitation of Bush's victory over Saddam, by June of 2006, many more Americans had died in the occupation of Iraq than in its liberation. Unlike the largely positive pictures that came

out during the initial war in Iraq, the images of young Americans burned alive in Fallujah, bombed in Ramadi, or maimed in Mosul were very tough for the Bush White House to spin; their immediacy was far less subject to elite filtering, as Benjamin would have anticipated.

Similarly, one aspect of life that has been largely hidden from most citizens during the nation-states era is the true face of warfare and occupation. No matter how vivid the texts of a Stephen Crane, a Leo Tolstoy, or an Ernest Hemingway, print could never take a nation to the frontlines the way video can. Previous presidents could occupy the Philippines or Haiti and fight a long bloody guerrilla war, secure in the knowledge that the public would never see the inevitable human costs of occupation. The images of death and upheaval in “liberated” Iraq forced a slow retreat from “Mission Accomplished” by the Bush White House. What had looked like the acme of image management later became an image blunder.⁹ At first, the president implied that the Navy, not his staff, had chosen the banner (Conason 2003a). Eventually, the White House admitted that they had planned and produced the banner, although the Navy had physically put it up on the ship (Conason 2003b). Karl Rove, the man most responsible for Bush’s image, conceded in an interview that “Mission Accomplished” had not been a wise move. Largely because of dissatisfaction with the war in Iraq, Bush eventually sank lower in presidential popularity than all but three postwar presidents. Contra Postman, the triumph of image over substance, of spin over reality, may be farther off than it initially seemed.

ENDNOTES

1. Although our anorexic media (particularly David Letterman) often labeled Clinton as “fat,” in fact, he was among our more telegenic presidents. Indeed, his image handlers probably did not mind the label, because it gave him something in common with millions of Americans, much the same way Bush’s fractured diction does. Clinton got the best of both worlds—he did not look fat on television, which would have been disastrous, but got to be seen sympathetically by obese Americans regardless.
2. Obviously, we are not considering the two female candidates, and we are also not getting picky about those two candidates with thinning hair problems.
3. And as seen by the rumors of plastic surgery swirling around John Kerry, even this reality is subject to alteration.
4. The phrase is political scientist Louis Brownlow’s, from his 1937 commission report on administrating the executive branch. Quoted in Allen Felzenberg, “The Transition: Guide for the President-Elect.” *Policy Review* 103 (October/November 2000).
5. See, for example, the letter by former White House staffer John DiIulio, which makes clear Bush’s common touch, as well as Paul O’Neil’s account as told in Ron Suskind, *The Price of Loyalty* (New York: Simon and Schuster, 2004).
6. The White House denies that it knew the decorative turkey would be there, or that Bush picking it up for the cameras was planned. Mike Allen, “The Bird Was Perfect but Not for Dinner: In Iraq Picture, Bush Is Holding the Centerpiece,” *Washington Post*, December 4, 2003, p. A33.

7. The Bush administration may also be controlling the image of the president at war in a subtle way, by enforcing with new vigor a policy denying media access to the arrival of military casualties from Iraq and Afghanistan at Dover Air Base. These images of coffins draped in flags had been emblematic of the costs of previous military conflicts.
8. This does not include Nixon, who left office before completing his term. James Pfiffner, *The Modern Presidency* (New York: St. Martins, 1994), 221.
9. It has even been compared to Michael Dukakis's head bobbling over the top of an M-1 tank, the previous nadir of self-inflicted image wounds.

REFERENCES

- Auletta, Ken, 2004. "Fortress Bush," *The New Yorker*, January 19.
- Baldauf, Scott, 1999. Lawsuit May Test Bush's Free-Speech Views," *Christian Science Monitor*, August 31, 1999.
- Bumiller, Elizabeth, "'Top Gun' and His Image-Makers," *The New York Times*, May 16, p. A1.
- Conason, Joe, 2003a. "The Enlisted and the Entitled," *Salon*, October 23.
- Conason, Joe, 2003b. "The Banner Stops Here," *Salon*, October 28.
- Felzenberg, Allen, 2000. "The Transition: Guide for the President-Elect," *Policy Review* available at www.policyreview.org/oct00/felzenberg.html.
- Hecko, Hugh, and Lester M. Salamon, 1981. *The Illusion of Presidential Government*, Boulder: Westview.
- Jacobson, Gary C, 2003. "The Bush Presidency and the American Electorate," *Presidential Studies Quarterly* 33 (4): 701–29.
- Kumar, Martha Joynt, 2003a. "Communications Operations in the White House of President George W. Bush: Making News on His Terms," *Presidential Studies Quarterly* 33 (2): 366–93.
- Kumar, Martha Joynt, 2003b. "Does This Constitute a Press Conference? Defining and Tabulating Modern Presidential Press Conferences," *Presidential Studies Quarterly* 33 (1): 221–37.
- Kurtz, Howard, 1999. The Story That Just Won't Check Out," *The Washington Post*, February 19, p. C1.
- Lindorff, Dave, 2003. "Keeping Dissent Invisible: How the Secret Service and the White House Keep Protesters Safely out of Bush's Sight—and off TV," *Salon*, October 16.
- Maltese, John A, 1992. *Spin Control: The White House Office of Communication and the Management of Presidential News*, Chapel Hill: University of North Carolina Press.
- Millbank, Dana, 2002. "Bush Loses Closest Political Aide," *The Washington Post*, April 24.
- Paltrow, Scot J., 2004. "Government Accounts of 9/11 Reveal Gaps, Inconsistencies," *Wall Street Journal*, March 22, p. A1.
- Pfiffner, James, 1994. *The Modern Presidency*, New York: St. Martins.
- Postman, Neil, 1985. *Amusing Ourselves to Death*, New York: Vintage.
- Reeves, Thomas C., 1997. *A Question of Character*, New York: Prima.
- Sealey, Geraldine, 2004. "Look Who Couldn't Come to Dinner," *Salon*, March 10.
- Shella, Jim, 2003. "Some Audience Members Told Not to Wear Ties for Bush Speech," WISH TV (Indianapolis), June 2. Available from <http://www.wishtv.com/Global/story.asp?s%20%201278487>.
- Suskind, Ron, 2004. *The Price of Loyalty*, New York: Simon and Schuster.
- Waterman, Richard W., Robert Wright, and Gilbert St. Clair, 1999. *The Image-Is-Everything Presidency*, Boulder: Westview.
- Welch, Reed L., 2003. Presidential Success in Communicating with the Public through Televised Addresses," *Presidential Studies Quarterly* 33 (2).
- Whitney, Gleeves, 2003. "George W. in the Flight Suit," *National Review Online*, May 8.
- York, Byron, 2001a. "Leakproof? At the Bush White House, Mum's the Word," *National Review*, October 21.
- York, Byron, 2001b. "Bush to a 'Tee': The President's Most Heartfelt Values Initiative," *National Review*, September 3.

Reading 20

The Presidential Pulpit: Bully or Baloney?

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We do not think of presidents as passively accepting the current state of public opinion. Theodore Roosevelt proclaimed, "People used to say of me that I . . . divined what the people were going to think. I did not 'divine' . . . I simply made up my mind what they ought to think, and then did my best to get them to think it."¹

On the other hand, when asked about his "biggest disappointment as president," George H. W. Bush replied, "I just wasn't a good enough communicator."² In a discussion of his problems in governing, President Clinton declared that he needed to do a better job of *communicating*. "[I]t's always frustrating to feel that you're misunderstood . . . and you can't quite get through."³

What is happening here? Leading the public is perhaps the ultimate resource of the political leader. It is difficult for others who hold power to deny the legitimate demands of a president with popular support. Theodore Roosevelt declared the White House to be a "bully pulpit," yet contemporary presidents typically find the public unresponsive to many issues at the top of the White House agenda and unreceptive to requests to think about, much less act on, political matters.

How should we evaluate the presidential pulpit as a tool for achieving passage of the president's programs in Congress? Should we accept the assumption of many journalists and scholars that the White House can persuade and even mobilize the public if the president simply is skilled enough at using the "bully pulpit"? Or have these commentators mistakenly attributed failures of presidential leadership to presidents' rhetorical deficiencies while ignoring broader forces in American society that may influence the leadership of public opinion? More broadly, are we looking in the right direction as we seek solutions to the problems of governing?

In another work, I outlined two contrasting views of presidential leadership.⁴ First, the president is the *director of change*, establishing goals and leading others where they otherwise would not go. The second perspective is less heroic. In this view, the president primarily is a *facilitator of change*, reflecting, and perhaps intensifying, widely held views and exploiting opportunities to help others go where they want to go anyway.

The director creates a constituency to follow his lead, whereas the facilitator endows his constituency's views with shape and purpose by interpreting and translating them into legislation. The director restructures the contours of the political landscape and paves the way for change, whereas the facilitator exploits opportunities presented by a favorable configuration of political forces.

This essay explores the potential of the presidential pulpit for leading the public—and thus increasing the chances of the president's policies passing in Congress. We will try to determine whether the presidential pulpit allows the president to be a director rather than a facilitator of change.

A TALE OF TWO PRESIDENTS

To obtain a better grasp of the challenges that presidents face in using the presidential pulpit to lead the public, let us examine the experiences of two recent presidents, Ronald Reagan and Bill Clinton, in attempting to lead the public.

Ronald Reagan

Ronald Reagan often was called “the Great Communicator.” Was he able to move the public to support his policies if it were not already inclined to do so? Like presidents before him, Reagan was a facilitator rather than a director of change. The basic themes that Reagan espoused in 1980 were ones he had been articulating for many years: Government was too big; the nation's defenses were too weak, leaving it vulnerable to intimidation by the Soviet Union; pride in country was an end in itself, and public morals had slipped too far. In 1976, conditions were not yet ripe for his message. It took the Carter years—with their gasoline lines, raging inflation, high interest rates, Soviet aggression in Afghanistan, and hostages in Iran—to create the opportunity for victory. By 1980, the country was ready to listen.

But not for long. In his memoirs, Reagan reflected on his efforts to ignite concern among the American people regarding the threat of communism in Central America and mobilize them behind his program of support for the Contras (rebels fighting the leftist government in Nicaragua):

For eight years the press called me the “Great Communicator.” Well, one of my greatest frustrations during those eight years was my inability to communicate to the American people and to Congress the seriousness of the threat we faced in Central America.⁵

Time and again, I would speak on television, to a joint session of Congress, or to other audiences about the problems in Central America, and I would hope that the outcome would be an outpouring of support from Americans who would apply the same kind of heat on Congress that helped pass the economic recovery package.

But the polls usually found that large numbers of Americans cared little or not at all about what happened in Central America—in fact, a surprisingly large proportion didn't even know where Nicaragua and El Salvador were located—and, among those who did care, too few cared enough about a Communist penetration of the Americas to apply the kind of pressure I needed on Congress.⁶

Reagan was frustrated not only in his goal of obtaining public support for aid to the Contras in Nicaragua;⁷ his leadership problem was broader than

this. On other national security issues, including military spending, arms control, military aid and arms sales, and cooperation with the Soviet Union, public opinion by the early 1980s had turned to the left—*ahead* of Reagan.⁸

Numerous national surveys of public opinion have found that support for regulatory programs and spending on health care, welfare, urban problems, education, environmental protection, and aid to minorities increased—contrary to the president's views—during Reagan's tenure.⁹ On the other hand, support for increased defense expenditures was decidedly lower at the end of his administration than when he took office.¹⁰ (This may have resulted from the military buildup that did occur, but the point remains that Reagan wanted to continue to increase defense spending, and the public was unresponsive to his wishes.)

Americans did not follow the president and move their general ideological preferences to the right.¹¹ Indeed, rather than conservative support swelling once Reagan was in the White House, there was a movement *away* from conservative views almost as soon as he took office.¹² According to Mayer, "Whatever Ronald Reagan's skills as a communicator, one ability he clearly did not possess was the capacity to induce lasting changes in American policy preferences."¹³

Thus, Ronald Reagan was less a public relations phenomenon than conventional wisdom indicates. He had the good fortune to take office on the crest of a compatible wave of public opinion, and he effectively exploited the opportunity that voters had handed him. When it came time to change public opinion or to mobilize it on his behalf, however, he typically met with failure. As his press secretary, Marlin Fitzwater, put it, "Reagan would go out on the stump, draw huge throngs, and convert no one at all."¹⁴

Bill Clinton

Ronald Reagan's difficulties in changing public opinion stretched over an eight-year period. Even in the short run, however, presidents face just as great a challenge. An examination of President Clinton's efforts to lead the public demonstrates this fact.

When the president's first major economic proposal, the fiscal stimulus plan, was introduced, it ran into strong Republican opposition. During the April 1993 congressional recess, Clinton stepped up his rhetoric on the bill; he counted on a groundswell of public opinion to pressure moderate Republicans into ending the filibuster on it. (Republicans, meanwhile, kept up a steady flow of sound bites linking the president's package with wasteful spending and Clinton's proposed tax increase.) The groundswell never materialized, and the Republicans found little support for any new spending in their home states. Instead, they found their constituents railing against new taxes and spending. The bill never came to a vote in the Senate.¹⁵

The president's next major legislative battle was over the budget. On August 3, 1993, he spoke on national television on behalf of his budget proposal, and Senate Republican leader Robert Dole spoke against the plan. A CNN overnight poll following the president's speech found that support for his budget plan *dropped*.¹⁶ Several million calls were made to Congress in response to both Clinton and Dole, and the callers overwhelmingly opposed the president's plan.¹⁷

When the crucial rule regarding debate on the 1994 crime bill was voted down in the House, the president immediately went public. Speaking to police officers with flags in the background, he blamed special interests (the National Rifle Association) and Republicans for a "procedural trick," but his appeal did not catch fire. Meanwhile, Republicans were talking about pork-barrel spending and tapping public resentment. Clinton's public push yielded the votes of only three members of the Congressional Black Caucus, so he had to go to moderate Republicans and cut private deals.

Most painful of all to President Clinton was his inability, despite substantial efforts, to sustain the support of the public for health care reform. Nevertheless, the White House held out against compromise with the Republicans and conservative Democrats, hoping for a groundswell of public support for reform. Again, it never came.¹⁸ Indeed, by mid-August 1994, only 39 percent of the public favored the Democratic health care reform proposals, while 48 percent opposed them.¹⁹

AN UNUSUAL SUCCESS

Presidents are not always frustrated in their efforts to obtain public support. In rare instances, the White House is able to move the public to communicate support for a president's policies directly to Congress. Mobilizing the public can be a powerful weapon to influence Congress. When the people speak, and especially when they speak clearly, Congress listens attentively.

Perhaps the most notable recent example of a president mobilizing public opinion to pressure Congress is Ronald Reagan's effort to obtain passage of his bill to cut taxes in 1981. Shortly before the crucial vote in the House, the president made a televised plea for support of his tax cut proposals, and he asked the public to let their representatives in Congress know how they felt. Evidently this worked, because thousands of phone calls, letters, and telegrams poured into congressional offices. How much of this represented the efforts of the White House and its corporate allies rather than individual expressions of opinion probably never will be known. Even so, on the morning of the vote, House Speaker Thomas P. ("Tip") O'Neill (D-Mass.) declared, "We are experiencing a telephone blitz like this nation has never seen. It's had a devastating effect."²⁰ With this kind of response, the president easily carried the day.

Of course, the White House is not content to rely solely on presidential appeals for a show of support. It may take additional steps to orchestrate public pressure on Congress. For example, Samuel Kernell described the auxiliary efforts at mobilization of Reagan's White House in 1981:

Each major television appeal by President Reagan on the eve of a critical budget vote in Congress was preceded by weeks of preparatory work. Polls were taken; speeches incorporating the resulting insights were drafted; the press was briefed, either directly or via leaks. Meanwhile in the field, the ultimate recipients of the president's message, members of Congress, were softened up by presidential travel into their states and districts and by grass-root lobbying

campaigns, initiated and orchestrated by the White House but including RNC and sympathetic business organizations.²¹

Reagan's White House tapped a broad network of constituency groups. Operating through party channels, its Political Affairs Office, and its Office of Public Liaison, the administration generated pressure from the constituents of congressional members, campaign contributors, political activists, business leaders, state officials, interest groups, and party officials. Television advertisements, letters, and attention from the local news media helped to focus attention on swing votes. Although these pressures were directed toward Republicans, Southern Democrats received considerable attention as well, which reinforced their sense of electoral vulnerability.

The administration's effort at mobilizing the public on behalf of the tax cut of 1981 is significant not only because of the success of the presidential leadership but also because it appears to be a deviant case—even for Ronald Reagan. His next major legislative battle was over the sale of AWACS planes to Saudi Arabia. The White House decided that it could not mobilize the public on this issue, however, and adopted an "inside" strategy to prevent a legislative veto.²²

During the remainder of his tenure, President Reagan went repeatedly to the people regarding a wide range of policies, including the budget, aid to the Contras in Nicaragua, and defense expenditures. Despite his high approval levels for much of the time, he never again was able to arouse many in his audience to communicate their support of his policies to Congress. Most issues hold less appeal to the public than do substantial tax cuts.

WHY THE PUBLIC IS DIFFICULT TO LEAD

Why did two outstanding American politicians such as Ronald Reagan and Bill Clinton have so much trouble influencing the public to support their policies? There are many answers, but to understand presidential leadership, we must first understand the nature of the president's potential followers.

Gaining the Public's Attention

To influence the public directly, the president must first obtain its attention. This usually poses a substantial challenge. On April 18, 1995, President Clinton gave his fourth prime-time news conference. Only CBS covered it live, while ABC and NBC showed reruns of the popular sit-com shows. We should not be surprised that only a small portion of the public saw the president.

Obtaining an audience is difficult, even when television coverage is greater. On August 3, 1993, President Clinton made a nationally televised address on the budget. Only 35 percent of the public saw even "some" of the speech.²³ A month later, he gave a major address on the defining issue of his administration: health care. Forty-three percent of the public saw little or none of the speech.²⁴ In general, the size of the audience for televised presidential speeches has declined over time.

Even if presidents gain the public's attention, they must hold onto it if they expect to change opinion and get Congress to respond accordingly. Keeping the public focused is very difficult, however. Focus requires limiting attention to a few priority items, and success in this endeavor will be determined to a large extent by the degree to which issues, including international crises, impose themselves on the president's schedule and divert attention from his priority agenda.

In the summer of 1994, as the White House entered the final negotiations over its high-priority bills on crime and health care reform, it had to deal first with the Whitewater hearings and then a huge influx of Cuban refugees. When the White House tried to put off focusing on welfare so as not to undermine its massive health care reform proposal, Senator Daniel Patrick Moynihan (D-N.Y.), then chairman of the Senate Finance Committee that had to handle much of health care reform, threatened to hold health care hostage until the White House devoted at least some attention to welfare reform.²⁵

Often, the White House can do little in such situations. As Clinton advisor George Stephanopoulos put it,

On the campaign trail, you can just change the subject. But you can't just change the subject as President. You can't wish Bosnia away. You can't wish David Koresh away. You can't just ignore them and change the subject.²⁶

The Public's Receptivity

No matter how effective presidents may be as speakers, or how well their speeches are written, they still must contend with the receptivity of the audience. Unfortunately for the White House, Americans rarely are attentive listeners and most are not very interested in politics.

Television is a medium in which visual interest, action, and conflict are most effective, and presidential speeches are unlikely to have these characteristics. Although some addresses to the nation occur at moments of high drama, such as President Johnson's televised demands for a voting rights act before a joint session of Congress in 1965, this is not typical. Style sometimes can give way to substance because of circumstances, but it usually is an uphill battle.

The relative importance that the typical person attaches to a president's address is illustrated by the attention that presidential staffs give to setting a date for the president's annual State of the Union message. They must be careful to avoid pre-empting prime time on the night that offers the current season's most popular shows while at the same time trying to maximize their national viewing audience.

The public's lack of interest in political matters can be very frustrating for the White House. It is difficult to get a message through; the public may misperceive or ignore even the most basic facts regarding a presidential policy. As late as 1986, 62 percent of Americans did not know which side the United States supported in Nicaragua despite extensive, sustained coverage of the president's policy and the congressional debate by virtually all news media.²⁷ Similarly, in June 1986, only 40 percent of the public had heard or read at

least something about Reagan's highest domestic priority, the tax reform bill before the Senate.²⁸

Americans are difficult to persuade and mobilize, not only because of their apathy but also because of their predispositions. Most people usually hold views and values that are anchored in like-minded social groups of family, friends, and fellow workers. Both their cognitive needs for consistency and their uniform (and protective) environments pose formidable challenges for political leaders to overcome. In the absence of a national crisis—which fortunately is a rare occurrence—most people are not open to political appeals.²⁹

Instead, citizens have psychological defenses that screen the president's message and reinforce their predispositions. A study of persons watching Ronald Reagan speak on television found that those who were previously supportive of him had a positive response to his presentation, whereas those who were previously disapproving became irritated.³⁰

Finally, although Americans are attracted to strong leaders, they do not seem to feel a corresponding obligation to follow their leadership. Cultural predispositions continue to bedevil presidential leadership.

Presentation

One factor that may affect the ability of presidents to obtain public support is the quality of their presentations to the people. Not all presidents are effective speakers, and not all look good under the glare of hot lights and the unflattering gaze of television cameras. All presidents since Truman have had advice from experts on lighting, make-up, stage settings, camera angles, clothing, pacing of delivery, and other facets of making speeches. Despite this aid, and despite the experience that politicians inevitably have in speaking, presidential speeches aimed at directly leading public opinion typically have not been very impressive. Only Kennedy, Reagan, and Clinton have mastered the art of speaking to the camera.

Presidents not only must contend with the medium but also must concern themselves with their messages. The most effective speeches seem to be those whose goals are general support and image building rather than specific support. They focus on simple themes rather than complex details. Calvin Coolidge successfully used this method in his radio speeches, as did Franklin Roosevelt in his famous "fireside chats." The limitation of such an approach, of course, is that general support cannot always be translated into public backing for specific policies.

Speeches also seem to be more successful when the political climate surrounding the policy topic at hand serves to reinforce the image of the president as a national leader and problem-solver. When the situation presents the president as inept or controversial, the image is not matched and the results are not favorable for the president.³¹ Most legislative matters on which the president seeks public support fall into the "controversial" category.

Presidents may be hindered by their inability to project clear visions of public policy. The need for simplicity in public messages places a premium on

coherence and consistency, both in the presentation of the administration's goals and the means for meeting them. Presidents often find this demand on their rhetoric difficult to satisfy, however. With the exception of Ronald Reagan, most recent presidents have been criticized for lacking a unifying theme and cohesion in their programs and for failing to inspire the public with a sense of purpose. Democratic presidents typically have large, diverse agendas, while Republicans such as Nixon and Bush I may combine a complex blend of traditional values and moderate policy stances, thus making it difficult to establish central organizing themes for their administrations.

CONCLUSIONS

A belief in the importance of obtaining public support for legislation is not surprising for presidents who have attained their office through lengthy campaigns and virtually constant communications, and for White House political advisers who have employed communications techniques adeptly during the preceding presidential campaign. There are important differences between campaigning and governing, however, and presidents must adjust if they are to succeed.

The transition between campaigning and governing rarely is smooth. As Charles O. Jones put it, "After heading a temporary, highly convergent, and concentrated organization" in a presidential campaign, the winner moves into the White House and becomes the "central figure in a permanent, divergent, and dispersed structure."³² Communication becomes more difficult as the president loses control of his agenda and has to convince people not that he is superior to his opponent(s)—a relatively simple comparative judgment—but that his calls for specific policies deserve support.

Public support is not a dependable resource for the president, nor one that he can easily create when needed to influence Congress. Most of the time, the White House can do no more than move a small portion of the public from opposition or neutrality to support, or from passive agreement to active support. Even a seemingly modest shift in public opinion, however, can be very useful to the president. For example, a change of 6 percentage points could transform a split in public opinion to a presidential advantage of 56 percent to 44 percent. Presidential leadership operates at the margins of the basic configurations of American politics, but these margins can be vital to a president's success.

There also are some occasions in which the president may wish to keep a low public profile. To attract fence sitters in Congress on issues of relatively low visibility, the White House may choose to "stay private." By doing so, the president may be able to avoid arousing opposition to some of his proposals. He also may avoid the appearance of defeat if he loses. Finally, staying private eases the path of reaching agreement with Congress, because to eschew public posturing provides maneuvering room for concessions and avoids the appearance of inconsistency when compromises are made.³³

In the end, the cards seem to be stacked against a president who tries to influence public opinion. John Kennedy once sardonically suggested an exchange from *King Henry IV, Part 1*, as an epigraph for a famous work on the presidency:

Glendower: I can call spirits from the vasty deep.

Hotspur: Why, so can I, or so can any man. But will they come when you do call for them?³⁴

ENDNOTES

1. Quoted in Emmet John Hughes, "Presidency vs. Jimmy Carter," *Fortune*, December 4, 1978, pp. 62, 64.
2. Victor Gold, "George Bush Speaks Out," *The Washingtonian*, February 1994, p. 41.
3. Quoted in Jack Nelson and Robert J. Donovan, "The Education of a President," *Los Angeles Times Magazine*, August 1, 1993, p. 14. See also "The President at Midterm," *USA Weekend*, November 4–6, 1994, p. 4.
4. George C. Edwards III, *At the Margins: Presidential Leadership of Congress* (New Haven, CT: Yale University Press, 1989).
5. Ronald Reagan, *An American Life* (New York: Simon and Schuster, 1990), p. 471.
6. Reagan, *An American Life*, p. 479.
7. Reagan, *An American Life*, pp. 471, 479; Page and Shapiro, *The Rational Public*, p. 276. See also *CBS News/The New York Times Poll* (News release, December 1, 1986), Table 5; *CBS News/The New York Times Poll* (News release, October 27, 1987), Table 17; and "Americans on Contra Aid: Broad Opposition," *The New York Times*, January 31, 1988, sec. 4, p. 1.
8. Benjamin I. Page and Robert Y. Shapiro, *The Rational Public* (Chicago, IL: University of Chicago Press, 1992), pp. 271–281; John E. Reilly, ed., *American Public Opinion and U.S. Foreign Policy 1987* (Chicago, IL: Chicago Council on Foreign Relations, 1987), Chapters 5–6; and William G. Mayer, *The Changing American Mind* (Ann Arbor, MI: University of Michigan Press., 1992), Chapters 4 and 6.
9. Seymour Martin Lipset, "Beyond 1984: The Anomalies of American Politics," *PS* 19 (1986), pp. 228–229; Mayer, *The Changing American Mind*, Chapters 5–6; Page and Shapiro, *The Rational Public*, pp. 133, 136, 159; and William Schneider, "The Voters' Mood 1986: The Six-Year Itch," *National Journal*, December 7, 1985, p. 2758. See also "Supporting a Greater Federal Role," *National Journal*, April 18, 1987, p. 924; "Opinion Outlook," *National Journal*, April 18, 1987, p. 964; "Federal Budget Deficit," *Gallup Report*, August 1987, pp. 25, 27; and "Changeable Weather in a Cooling Climate," pp. 261–306. See also *CBS News/The New York Times Poll* (News release, October 27, 1987), tables 16, 20.
10. Lipset, "Beyond 1984," p. 229; Mayer, *The Changing American Mind*, pp. 51, 62, 133. See also "Defense," *Gallup Report*, May 1987, pp. 2–3; "Opinion Outlook," *National Journal*, June 13, 1987, p. 1550; and *CBS News/The New York Times Poll* (News release, October 27, 1987), Table 15.
11. See, for example, John A. Fleishman, "Trends in Self-Identified Ideology from 1972 to 1982: No Support for the Salience Hypothesis," *American Journal of Political Science* 30 (1986), pp. 517–541; Martin P. Wattenberg, "From a Partisan to a Candidate-centered Electorate," in Anthony King, ed., *The New American Political*

- System* (Washington, DC: American Enterprise Institute, 1990), pp. 169–171; and Martin P. Wattenberg, *The Rise of Candidate-Centered Politics* (Cambridge, MA: Harvard University Press, 1991), pp. 95–101.
12. James A. Stimson, *Public Opinion in America: Moods, Cycles, and Swings* (Boulder, CO: Westview, 1991), pp. 64, 127.
 13. Mayer, *The Changing American Mind*, p. 127.
 14. R. W. Apple, "Bush Sure-Footed on Trail of Money," *New York Times*, September 29, 1990, p. 8.
 15. "Democrats Look to Salvage Part of Stimulus Plan," *Congressional Quarterly Weekly Report*, April 24, 1993, pp. 1002–1003.
 16. Bob Woodward, *The Agenda: Inside the Clinton White House* (New York: Simon and Schuster, 1994), p. 285. A CBS News/*New York Times* Poll with before and after samples on August 2 and 3 found that support for the president's budget remained unchanged even in the immediate aftermath of the speech, but that opposition weakened.
 17. "Switchboards Swamped with Calls Over Tax Plan," *The New York Times*, August 5, 1993, p. A18.
 18. "Health Care Reform: The Lost Chance," *Newsweek* September 19, 1994, p. 32.
 19. Gallup poll of August 15–16, 1994.
 20. Quoted in "Tax Cut Passed by Solid Margin in House, Senate," *Congressional Quarterly Weekly Report*, August 1, 1981, p. 1374. See also Samuel Kernell, *Going Public* (Washington, DC: Congressional Quarterly Press, 1986), pp. 120–121.
 21. Samuel Kernell, *Going Public*, p. 137. See also p. 116.
 22. See "Reagan's Legislative Strategy Team Keeps His Record of Victories Intact," *National Journal*, June 26, 1982, p. 1130.
 23. Gallup poll of August 3, 1993.
 24. Gallup poll of September 3, 1993.
 25. Jason DeParle, "Moynihan Says Clinton Isn't Serious About Welfare Reform," *The New York Times*, January 8, 1993, p. 8.
 26. Quoted in Thomas L. Friedman and Maureen Dowd, "Amid Setbacks, Clinton Team Seeks to Shake Off the Blues," *The New York Times*, April 25, 1993, Sec 1, p. 12.
 27. CBS News/*The New York Times* Poll (News release, April 15, 1986), Table 15.
 28. CBS News/*The New York Times* Poll (News release, June 24, 1986), Table 9.
 29. For a discussion of the social flow of information, see Robert Huckfeldt and John Sprague, "Networks in Context: The Social Flow of Political Information," *American Political Science Review* 81 (December 1987): 1197–1216.
 30. Roberta Glaros and Bruce Miroff, "Watching Ronald Reagan: Viewers' Reactions to the President on Television," *Congress and the Presidency* 10 (Spring 1983): 25–46.
 31. Lyn Ragsdale, "Presidential Speechmaking and the Public Audience: Individual Presidents and Group Attitudes," *Journal of Politics* 49 (August 1987): 704–736.
 32. Charles O. Jones, *The Presidency in a Separated System* (Washington, DC: Brookings Institution, 1994), p. 294.
 33. Cary R. Covington, "'Staying Private': Gaining Congressional Support for Unpublicized Presidential Preferences on Roll-Call Votes," *Journal of Politics* 49 (August 1987): 737–755.
 34. Theodore C. Sorensen, *Kennedy* (New York: Bantam, 1966), p. 440.

The Institutional Presidency

The idea of an institutional presidency is a modern one. During the 19th century, presidents played a limited role in routine national policymaking, in accordance with the Framers' expectation that Congress would be the primary policymaking body in the new American government. Although the Constitution did not provide for any formal advisory structure for the president, it did provide that the president could require reports from the officers of the executive branch. George Washington began to seek advice from the heads of the departments, and this group of department heads began to be known as the "Cabinet." It was not until 1857 that Congress even provided a government-paid secretary for the president, and by the time of President Hoover (1929–1933) the president's staff was still limited to only several professionals paid by the government. All of this changed, however, with the creation of the modern presidency during the terms of Franklin D. Roosevelt.

With the growth of domestic agencies as the government geared up to fight the Great Depression, Franklin D. Roosevelt felt that he needed more administrative authority to control and direct the many new agencies created during his first term. In 1936, he asked three public administration scholars, headed by Louis Brownlow and known as the Brownlow Committee, to provide a report that would justify an expanded presidential apparatus along with the necessary legal power to take much more direct control of the executive branch. Although the initial report was rejected by Congress, the president's efforts finally came to fruition in 1939, when Congress gave him six new professional White House staff positions and the authority to reorganize parts of the executive branch (subject to congressional veto). Roosevelt used his new power to create by executive order the Executive Office of the President (EOP), which would be the basis for the expansion of White House staff over the next half century.

The first selection in this section is the part of the Brownlow Committee Report, which lays out the rationale for an expanded, professional White House staff. It stands today as the classic statement of the appropriate role of White House staffers, regardless of how Brownlow's ideals have been ignored by many presidential aides.

President Truman's administration saw the expansion of the institutional apparatus of the presidency with the creation by Congress of the Council of Economic Advisers. More far reaching, however, was the National Security Act of 1947, which created the Department of Defense, the Central Intelligence Agency, and the

National Security Council (NSC). The NSC and its small staff were neglected by Truman during the 1940s, but when the Korean War began in 1950, he came to rely on NSC meetings to formulate strategy for the war. President Eisenhower used the NSC by creating a formalized system of committees to develop national security policy options and coordinate implementation of his decisions. Eisenhower also created a formal superstructure to control the organization of the White House through a staff secretary and chief of staff who would oversee its operation.

With this base, the office of the presidency expanded to include a White House Office of more than 500 people by the 1970s, which in turn was part of the larger EOP, which included about 2,000 people by the 1980s and remained about that size into the 21st century. This section deals with the institutional presidency and puts particular emphasis on how presidents can best ensure that all of these offices in fact do what presidents want. The broader purpose of the EOP is to enable the president to manage a huge executive branch, which has grown to more than 1.8 million civilian employees.

The president's primary formal advisory mechanism for the first century and a half of the Republic was the president's cabinet, composed of the heads (secretaries) of the major departments of the executive branch. But with the increasing number of departments in the mid-20th century and the expanding role of government, the cabinet has atrophied as the major advisory mechanism for presidents. Cabinet meetings are still important in the presidency, but more as informational and team-building mechanisms than as policy deliberation. The function of advising the president has shifted to the White House staff, which is closer to the president. White House staffers are chosen for personal compatibility; their offices are in the White House complex; and their attention is not diverted by the need to manage large bureaucracies. Cabinet secretaries are important as implementers of policy and managers of their departments, but only central to advising the president as individuals, not as a collective body.

Hugh Heclo, a professor at George Mason University, argues that new presidents have the ability to reorganize the presidential office to their personal desires—but only at a superficial level. In “The Changing Presidential Office,” Heclo explains that the “deep structure” of the office is shaped not by personal preferences but by the expectations that others have of each president. Thus, presidents cannot easily decide *not* to have their personal lobbyists on Capitol Hill (Office of Congressional Liaison), *not* to have personal agents coordinate the policies of the State and Defense Departments (NSC staff), or *not* to provide press releases and information about the president's program to the press (press secretary). As presidential power has increased, it also has become diffused and shared by many presidential helpers. Thus, the problem is how to ensure that all of these aides serve presidential needs and prevent the numerous helpers from using the president for their own purposes. Presidents must be very selective in what they allow their staffs to undertake, Heclo concludes, or they will be overwhelmed by the demands to run all of the government from the center.

In the next selection, Bradley Patterson (a veteran White House staffer of the Eisenhower, Nixon, and Ford administrations) and James Pfiffner outline the range of political appointments available to presidents. They argue that

the volume of appointments is so great, with a total of more than 6,000, that preparation to recruit these people must begin before the election. They outline the development of the White House capacity to control these appointments in the Office of Presidential Personnel and how it should be organized for the president. Finally, they explain the sources of conflict that each new administration faces in deciding whom the president should appoint to lead the executive branch.

President Bush and attorneys in his administration propounded an approach to executive authority known as the “unitary executive” theory. In his article, Richard Waterman argues that such an approach would leave Congress out of major areas of public policy that have traditionally been shared between Congress and the president. Proponents of the theory argue that Congress can have no voice in any administrative matters in the executive branch because the president alone is given complete control of the executive. This claim seems to run counter to Madison’s observation in *Federalist* 47; in commenting on the intermixture of governing powers set forth in the Constitution, he cites Montesquieu: “he [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other” (emphasis in original). The war power and the spending power alone, as set forth in the Constitution, ought to signify that the Framers intended for the three branches to share power.

The institutions of the presidency have continued to grow in size and scope that parallels the growth of the national government. It takes a White House bureaucracy to keep tabs on and direct the bureaucracies of the executive branch. Presidents tend to want to centralize control, but they do so at the cost of overwhelming their own capacity for management. More delegation to cabinet-level departments and more selective central control would likely improve executive branch management.

SELECTED BIBLIOGRAPHY

- Arnold, Peri, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1989* (Knoxville, TN: University of Tennessee Press, 1989).
- Burke, John P., *The Institutional Presidency* (Baltimore, MD: Johns Hopkins University Press, 1992).
- Campbell, Colin, *Managing the Presidency* (Pittsburgh, PA: University of Pittsburgh Press, 1986).
- Fenno, Richard, Jr., *The President’s Cabinet* (New York: Vintage Books, 1959).
- Fisher, Louis, *The Constitution Between Friends: Congress, the President, and the Law* (New York: St. Martin’s Press, 1978).
- Hart, John, *The Presidential Branch* (Chatham, NJ: Chatham House, 1995).
- Hess, Stephen, with James Pfiffner, *Organizing the Presidency*, 3rd ed. (Washington, DC: Brookings Institution Press, 2002).
- Kumar, Martha J., and Terry Sullivan, *The White House World: Transitions, Organizations, and Office Operations* (College Station, TX: Texas A&M University Press, 2003).
- Nathan, Richard P., *The Administrative Presidency* (New York: John Wiley and Sons, 1983).
- Pfiffner, James P., *The Managerial Presidency*, 2nd ed. (College Station TX: Texas A&M University Press, 1999).
- Pfiffner, James P., *The Modern Presidency*, 6th ed. (Boston, MA: Wadsworth, 2011).
- Pfiffner, James P., *The Strategic Presidency*, 2nd ed. (Lawrence, KS: University Press of Kansas, 1996).
- Seidman, Harold, and Robert Gilmour, *Politics, Position and Power*, 4th ed. (New York: Oxford University Press, 1986).
- Shanton, Peter, ed., *Federal Reorganization: What Have We Learned?* (Chatham, NJ: Chatham House, 1981).
- Walcott, Charles E., and Karen M. Hult, *Governing the White House: From Hoover Through LBJ* (Lawrence, KS: University Press of Kansas, 1995).

Reading 21

The White House Staff

THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (BROWNLOW COMMITTEE)

In this broad program of administrative reorganization the White House itself is involved. The President needs help. His immediate staff assistance is entirely inadequate. He should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government. These assistants, probably not exceeding six in number, would be in addition to his present secretaries, who deal with the public, with the Congress, and with the press and the radio. These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides the President should be free to call on departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old positions.

This recommendation arises from the growing complexity and magnitude of the work of the President's office. Special assistance is needed to insure that all matters coming to the attention of the President have been examined from the over-all managerial point of view, as well as from all standpoints that

would bear on policy and operation. It also would facilitate the flow upward to the President of information upon which he is to base his decisions and the flow downward from the President of the decisions once taken for execution by the department or departments affected. Thus such a staff would not only aid the President but would also be of great assistance to the several executive departments and to the managerial agencies in simplifying executive contacts, clearance, and guidance.

The President should also have at his command a contingent fund to enable him to bring in from time to time particular persons possessed of particular competency for a particular purpose and whose services he might usefully employ for short periods of time.

The President in his regular office staff should be given a greater number of positions so that he will not be compelled, as he has been compelled in the past, to use for his own necessary work persons carried on the pay rolls of other departments.

If the President be thus equipped he will have but the ordinary assistance that any executive of a large establishment is afforded as a matter of course.

In addition to this assistance in his own office the President must be given direct control over and be charged with immediate responsibility for the great managerial functions of the Government which affect all of the administrative departments. . . . These functions are personnel management, fiscal and organizational management, and planning management. Within these three groups may be comprehended all of the essential elements of business management.

The development of administrative management in the Federal Government requires the improvement of the administration of these managerial activities, not only by the central agencies in charge, but also by the departments and bureaus. The central agencies need to be strengthened and developed as managerial arms of the Chief Executive, better equipped to perform their central responsibilities and to provide the necessary leadership in bringing about improved practices throughout the Government.

The three managerial agencies, the Civil Service Administration, the Bureau of the Budget, and the National Resources Board should be a part and parcel of the Executive Office. Thus the President would have reporting to him directly the three managerial institutions whose work and activities would affect all of the administrative departments.

The budgets for the managerial agencies should be submitted to the Congress by the President as a part of the budget for the Executive Office. This would distinguish these agencies from the operating administrative departments of the Government, which should report to the President through the heads of departments who collectively compose his Cabinet. Such an arrangement would materially aid the President in his work of supervising the administrative agencies and would enable the Congress and the people to hold him to strict accountability for their conduct.

Reading 22

The Changing Presidential Office

HUGH HECLLO

The office of the president has become so complex, so propelled by its own internal bureaucratic dynamics, that it now presents every new president with a major problem of internal management. Without a conscious effort to the contrary, he may not even perceive the prison that his helpers erect around him.

To tackle this problem successfully, a president must be aware of how “his” office can constrain him and must use “his” staff at least as effectively as they use him. He must be aware of the management impact of everything he does. He must choose his priorities carefully and pursue them tenaciously lest he become dependent on the priorities of everyone else around him. He must have a good sense of how his staff act and interact. He must maintain a delicate balance between the executive office and his appointees in the departments and agencies. Above all, he must set himself at the center of a web of pressures and counter-pressures that ultimately serves his purposes.

THE INTERNAL MANAGEMENT PROBLEM OF THE PRESIDENCY

Our most familiar image of the presidency finds a man, sitting alone, in the dimly lit Oval Office. Against this shadowy background the familiar face ponders that ultimate expression of power, a presidential decision.

It is a compelling and profoundly misleading picture. Presidential decisions are obviously important. But a more accurate image would show a presidency composed of at least 1,000 people—a jumble of personal loyalists, professional technocrats, and bureaucratic staff with one man struggling, often vainly, to stay abreast of it all. What that familiar face ponders in the Oval Office is likely to be a series of conversations with advisers or a few pages of paper containing several options. These represent the last distillates produced from immense rivers of information flowing from sources—and condensed in ways—about which the president probably knows little. The great irony is that, as more and more forces combine to program the president, he sees only people who are trying to help him do what he wants.

In 1980, the Executive Office of the President (EOP) is composed of 10 disparate major units, including a White House office with its own two dozen or so basic subdivisions. The number of people involved is subject to a variety of

Source: Arnold Meltsner, *Politics and the Oval Office* (San Francisco: Institute for Contemporary Studies, 1981). Used by permission of Hugh Hecllo.

inventive accounting methods, but a reasonable approximation would be 500 or so people attached to the White House and another roughly 1,500 people in the rest of the EOP.¹ There seems little doubt that a trimmer, more rational, staffing arrangement would help a president meet national needs as well as substantially simplify any president's job of managing his own office.

Yet, however the presidency is equipped with staffs and processes, the president's personal management problem remains. His choice is to run or to be run by his office. No conceivable staffing arrangement will meet all his needs, and yet every arrangement carries the potential of submerging his interests into those of his help and their machinery. All the trends suggest that the grip of this well-intentioned machinery on the president is likely to grow, just as it has grown in the past two decades. The president's great danger lies in thinking that by making decisions he is actually managing. His internal management problem—the underside of the presidency—is to use those who serve him without becoming dependent on them. He must avoid being victimized by their loyalty to him or by his loyalty to them. To put it most directly, I do not see how, given contemporary demands on the office, a president can exercise leadership without being quietly manipulative within that office.

CONSTRAINTS ON INTERNAL MANAGEMENT

At first blush, it would seem that the internal arrangements of his own office are simply a matter of presidential taste. And so they are in most unimportant respects. Apart from matters of style, the president's main area of discretion is the choice as to what personalities he will deal with directly in the everyday running of his office. Even this choice is likely to be constrained by personal commitments to familiar aides, particularly since no modern candidate can hope to negotiate the long drawn-out campaign process without a bevy of loyal aides. Those who manage the campaign bureaucracy inevitably have a claim on the White House bureaucracy.

In terms of its *deep structure*, however, the office is largely a given that a president can change slowly if at all. This structure is a web of other people's expectations and needs. On the surface, the new president seems to inherit an empty house. In fact, he enters an office already shaped and crowded by other people's desires. What the would-be presidents seem to be reaching for on the nightly news is simply the top prize in our ultimate contest as a competitive society. What the winner grasps is an office that is the raw, exposed ganglion of government where immense lines of force come together in ways that no single person can control. The total effect is to program the modern president.

Legal and Political Pressures

One set of constraints arises from a growing number of statutory requirements placed on the office. Core advisory units of the presidency (Council of Economic Advisers, National Security Council, Domestic Council) were established by laws passed by Congress and can be altered only by persuading

Congress to change these laws. A president can, of course, use or bypass this formal machinery, but the fact is that over the years these units have generally been accepted as important parts of the presidency and have generated expectations that presidents will not simply ride roughshod over their operations. For example, as President-elect Reagan prepared to take office, a key issue discussed was who would bring to him the work of staffs from the national security and domestic councils, not whether to have and to use these units in the first place.

Legal constraints also arise from statutory requirements that tell a president what he must do. At last count there were 43 separate requirements for annually recurring presidential reports (environmental impacts, foreign arms sales, and so on). None of these reports are things about which a president bothers himself personally except in the rarest of circumstances. What they require are more staff work, more specialists, and more routines within the presidency. Each process gives someone a proprietary interest in that process—in other words, someone other than the president with a claim on what must get done in the presidency.

A second part of the web preventing a president from designing his own office is the political interest of outsiders. Many people, it turns out, have a stake in the internal arrangements of the presidency. Even a hint of major increases in presidential staff arouses immediate and intense congressional criticism. Thus President Carter in his first few months in office, for example, in order to avoid future trouble with his reorganization plans, had to informally promise a leading congressional committee chairman that he would not increase the size of the EOP even though important, nonpolitical parts of the presidency were seriously undermanned.

Congressional committees hold the purse strings for every major unit in the EOP; they can and have made life miserable for the head of a unit such as the president's Office of Management and Budget (OMB), requiring exhaustive and exhausting testimony, cutting funds for unfavored projects, and adding staff for functions bearing no relation to a president's interests. Since the Nixon administration, moreover, Congress has been far more reluctant to grant funds in special emergency or "management improvement" accounts which presidents could formerly use largely at their discretion. Even a president's papers are no longer his. Under a recent congressional enactment, President Reagan will be the first chief executive in our history who will not be able to take his papers away with him when he leaves office.

Congress is only the most obvious of the political constituencies constraining presidential management of the presidency. Various specialized communities have an interest in staking out claims to particular pieces of the Executive Office. This applies, for example, to the Office of Science and Technology Policy (disbanded in 1973 and reinstated in 1976 at the demand of the scientific community), environmentalists (Council on Environmental Quality), and many others in the recent past. More subtly, the Council of Economic Advisers serves as the voice of the economics profession and the National Security Council does likewise for professional students of foreign and military affairs.

Even though each of these communities contains different viewpoints from which a president can pick and choose, he is not free to deny someone from these professional groups a major advisory role in the highest councils of his administration.²

Legal constraints and political constituencies in the presidency have grown in the past two decades, but a president can try to “manage around” them by observing the formalities. Whatever the statutory requirements, a president’s real management system consists of whom he consults, where he bestows trust, and how he polices those in his trust. There are two remaining sets of constraints that have grown in recent years and that strike at the very heart of this real-life management system. Because they spring from deep-seated social and political trends, these two forces are not elements that can be managed around. Indeed, presidents under the necessity of responding to these twin pressures become the agents for programming their own office. The more that recent presidents have thought they were putting their personal stamp on the office and events, the more they have affirmed a larger design that they cannot control and can rarely comprehend.

The Requisites of a Presidential Party

As far as one can tell from the historical record, the five presidents since Eisenhower did not consciously plan to create their own political parties. Yet that, in embryo, is what has come to exist in the White House. Consider for a moment some of the specialized subdivisions that existed in the Carter White House *before* the active start of the 1980 presidential campaign:

- Assistant to the President (Women’s Affairs)
- Assistant to the President (Organizational Liaison)
- Special Assistant for Hispanic Affairs
- Special Assistant for Ethnic Affairs
- Special Assistant for Civil Rights
- Counselor to the President on Aging [ours, not his]
- Special Assistant for Consumer Affairs
- Assistant for Intergovernmental Affairs
- Assistant for Congressional Liaison
- Special Assistant to the President (Press and Public Relations)

Taken as a whole, the list indicates something more important than the desire of particular groups to have their representatives at the president’s elbow. What these and similar political operatives for other presidents suggest is an attempt to reach out from the White House and to build at least some lines of reliable political support for presidents. If one were inventing a political party, these are exactly the types of offices at branch headquarters that one would want to create. What is lacking is only the local cells that would give such an organization feet and hands. As President Carter discovered, fire-side chats, town meetings, and convocations with local publishers and editors are no substitute for *that*.

The fact is that each president during the last 20 years has felt increasingly compelled to mobilize the White House to build the equivalent of a presidential party for governing. To some presidents (such as Johnson or Nixon) the inclination comes naturally but, whatever the vagaries of personality, every contemporary president has been under pressure to move in the same direction. The reason is clear: a more politically volatile public, a less-manageable Congress, a disappearing party hierarchy, proliferating groups of single-minded activists which merge with the networks of policy experts discussed later. All these add up to a shifting political base of support for presidents. This is not atomization—a breaking down of our political life into tiny elemental particles. It is rampant pluralism, with groups crosscutting the political landscape into incoherent patterns. Atomization would produce anomie and anarchy. Rampant pluralism produces what we in fact have: unnegotiable demands, political stagnation, and stalemate.

People in the White House have had little choice but to try and cope with this trend by shoring up the president's own base of support. Given the succession of one-term presidents since the Kennedy assassination, no one would want to claim great success for these efforts, but that is not the point. What modern president could reasonably be expected to give up the attempt at using the White House to build a presidential party?

Once that fact is admitted, we can begin to see how even the most loyal aides and the presidents themselves cooperate in the programming of the modern presidency. When mayors or governors have problems, it is not enough to refer their calls to some departmental appointee or bureaucrat. Doing that will not build the strong relations which a president needs. Hence, someone in the White House is tasked to keep an eye on "intergovernmental relations." A small staff develops. The mayors' and governors' telephone calls are returned from the White House, their entrée to the bureaucracy smoothed a little. By helping them, the president helps himself. In the longer run, however, the president acquires a staff with a vested interest in continuing to process such problems, and he confirms the larger expectation that he is somehow responsible for seeing to it that a fiendishly complex federal system works to the satisfaction of all concerned.

There is no need to belabor the point. The same dynamic applies in one area of presidential activity after another. Will the president work exclusively through top congressional leaders, none of whom can control the actions of the legislature? Or will the president try to string together the many pieces of Congress that are in business for themselves? All the pressures of the moment dictate the latter course. Accordingly, the president acquires an extensive congressional liaison staff, doing favors and attracting demands for more. President Carter in his first year showed little willingness to be programmed as a builder of his own party in Congress, and he paid dearly for following his preferences. Can a president rest content in channeling relations he needs with all the interest groups in our mobilized society through his party's national committee or a federal department? The answer began to come clear as early as 1940 when Franklin Delano Roosevelt, in seeking a third term,

had one aide working part time on relations with ethnics and unions and another preparing materials on what the New Deal had done “for the benefit of Negroes.”³ Since then, a veritable political technocracy of such people has developed, entangling the presidential office in extensive networks of activists interested in this and that issue.

There is—or seems to be—a way out of all these entanglements produced by the need of presidents to create a quasi party for themselves. Richard Neustadt described it in late 1979:

While national party organizations fall away, while congressional party discipline relaxes, while interest groups proliferate and issue networks rise, a President who wishes to compete for leadership in framing policy and shaping coalitions has to make the most he can out of his popular connection. Anticipating home reactions, Washingtonians . . . are vulnerable to any breeze from home that presidential words and sights can stir. . . . The President with television talent will be likely to put his very talent at the center of his hopes when he takes office.

As viewers of the past four presidents can attest, even chief executives with a definite untalent for television are likely to seize on the tube to deploy their leadership. Unfortunately, by trying to do a little programming of their own on TV, presidents do not escape their personal management problem and may (especially if talented) only add to it by mistaking a successful screen image for the substance of leadership.

The tube is a blunt instrument. It allows a president to explain himself, catch a mood, create a persona. These are important, but they are not things through which a president escapes the programming that crowds in on his leadership. On the contrary. The generalized utility of television for the president has a counterpart in the media’s need for its own kind of presidency. The increasingly powerful news media needs stories, preferably with a White House backdrop. They need presidential statements to help create the story, favored access, and background information from the White House staff to give them an edge in the competition for stories. When all else fails, the media need care and feeding by the White House press office with a steady stream of handouts to those who cannot find a story. This communications industry complex of the presidency is a far cry from the early off-the-record chats that presidents used in order to give the “boys in the press” an idea of their thinking and activities. The media’s expectations run against the grain of the president’s managerial needs for private deliberations, for discretion as to when to get into or out of the news, and for an administration that appears united. Television language accurately captures the disutility of the medium for presidential management purposes. The tube *follows* stories, but the president must first manage a process for choosing where *he* wants to go. TV *covers* events in general, but the president’s office needs to give sustained attention to specific, often technical, matters where there is never a clear story line.

The requisites for a presidential party, including television, are probably with the White House to stay. The members of his political technocracy will

be a constraint or an opportunity—usually some weighting of both—for a president, depending on how he maneuvers among them. But if they are not to be pure constraint, the watchword must be active presidential maneuvering, not lying in repose or trusting in his aides' undoubtedly sincere professions of loyalty. Yet this section has referred only to the political base of the president's office. Another trend strikes even deeper into the presidency than has our growing political fragmentation and volatility. This is a massive social diffusion of policy-making powers.

The Hemorrhage of Presidential Power

The classic question to ask about the presidential office is what has happened to its power. It is a question that invites a thumbs up or thumbs down vote: Increasing or decreasing? More imperial or more post-Watergate? The developments of the last 20 years call for a more complicated answer. Presidential power has increased by becoming more extended, scattered, and shared; it has decreased by becoming less of a prerogative, less unilateral, and less closely held by the man himself. The right word for what has happened to the power of the office is diffusion, not dissipation. This condition exists, not basically because Congress or other groups have made successful grabs at the president's power but because of the very nature of modern policy-making and the growth of federal activity.

Consider for a moment the anti-bureaucracy Reagan transition bureaucracy. This effort, writ small, is a good snapshot of what has happened to presidential power. The president-elect begins before inauguration with a \$2 million, taxpayer-funded budget, a building, a motor pool, a minimum of seven dozen advisory committees, a communications system, and official stationery for the "Office of the President-Elect."

What, a person may well ask, is going on here? Certainly some of this is intended only for public consumption, some as a political liaison job for building the relations necessary to a presidential party. But there is more than that, and it shows up in the substantive work of the various policy groups and "issue clusters." The president-elect may have a few general themes in mind but to have any impact on complex modern policies he needs to have specific, usually highly technical, proposals. Moreover, whatever he might want to do to increase or to decrease federal government activity, he is automatically entangled in a web of relations with other people who can have a decisive impact on the same issue—not just congressmen, but a bureaucracy of congressional staffs numbering well over 13,000 professionals; not just mayors and governors, but analysts and lobbyists to represent these elected officials in Washington; not just grasping interest groups, but a mini-industry in the nation's capital employing 15,000 or more full-time professionals.

The exact numbers are less important than the fact that the federal government has acquired responsibilities requiring successful linkages between all manner of public, semi-public, and private groups. This applies not only to functions acquired in the last two decades—consumer protection, medical and

school financing, mass transportation, and so on—but also to older tasks enhanced with more demanding goals: occupational safety, natural resource use and protection, economic management and industrial revitalization, and so on. Can the president, with a few themes and a handful of aides, negotiate his ideas through these linkages and past the many other knowledgeable participants with a stake in what he is doing? Not likely. And so the helpers, offices, and briefing books pile up on the president-elect no less than on the presidency.

The United States does not have a high-level, government-wide, civil service that could (as in European countries) help a new chief executive and his top team turn their ideas into administrative realities; there is scarcely even a low-level civil service in the White House to help with the paperwork. The increasing resort to transition bureaucracies is one accommodation to this fact, thereby loading onto the presidency more of the responsibility for turning themes into playable scores than would otherwise be the case. But with or without a competent civil service, the very nature of federal activity impels the presidency to become a predictable bureaucracy so that other participants can play their parts.

Imagine, for example, a president committed to replacing government regulation with market competition and incentives in various policy areas. Having grown accustomed to the old regulations and possessing the power to make or break any proposed “market solution” that affects them, people in Congress, the departments, interest groups, and sub-national governments need to know what, in detail, the president proposes to do. To create a market where none has been implies some forethought about how far it will extend, what transitional arrangements with the affected groups will be made, how this will affect programs in related areas, what rules of competition will be enforced, and who will enforce them. Because markets typically impose some costs and spillovers that many people consider unfair, thought must also be given to compensations, subsidies, and other kinds of protections (more regulations). All of this implies presidential helpers who can work knowledgeably with planners, analysts, economists, administrators, inspectors, lawyers, not to mention all the political legwork involved. To survive in this kind of world, the president needs to be surrounded by policy technocrats no less than by the political technocrats of his quasi-party. But how can the president know that all these bright, committed, and (like the rest of us) self-interested people are doing what *he* would want?

THE PRESIDENT AS MANAGER

Whoever the president and whatever his style, the political and policy bureaucracies crowd in on him. They are there in his office to help, but their needs are not necessarily his needs. Delegation is unavoidable; yet no one aide or combination of aides has his responsibilities or takes his oath of office. However much the president trusts personal friends, political loyalists, or technocrats, he is the person that the average citizen and history will hold accountable.

If this diagnosis of the presidential office is close to the truth, then there is one big prescription. The president must take responsibility for deprogramming himself. Since the deep structure of the office is shaped by trends well

outside his control, the president must try to preserve his maneuverability within this structure—a maneuverability not just in the images of personal style, but in the substance of work that gets done around him. Trusting a chief of staff or a few senior aides is not enough. Behind the scenes, the president must manage and manipulate if he is not to be suffocated by the political and policy technocrats of Washington.

To manage is something that falls between administering in detail and merely presiding in general. At most, the president himself can directly administer one or two major issues and half a dozen or so senior aides. And to preside is a dangerous abdication to the momentum of forces around him. It is difficult to put the president's management chore into words without seeming to be cynical or sinister. To speak of the president's manipulation of the people in his office should not summon up Nixonian memories, for if ever there was a president cut off from (though criminally responsible for) what was going on in his own office, it was Richard Nixon. The appropriate mentor is still the first inhabitant of the modern presidency, Franklin Roosevelt. For a paraplegic president, his appreciation for the primary task of internal management came almost instinctively: to use those who waited on him without becoming dependent on them.

Roosevelt had his tactics; other presidents will have theirs. But the basic necessity for personal management remains and grows as modern presidents become increasingly penned in. Programmed more than paralyzed, today's president needs many different eyes and ears for the things he should know, legs to take him where he should be, and protective devices to avoid situations that leave him vulnerable.

How to do all this? The exact structure and personalities are less important than sometimes thought. Given the record of recent administrations, there are some useful guidelines to be drawn from experience, usually of the painful variety. These guidelines are as follows:

1. Self-awareness is the place to begin. The president, by his own actions and even more by the anticipations of his actions that he creates in other people, generates a kind of *de facto* management system. The more he is willing to do, the more he will be asked to do. The more questions he will take rather than passing them to others, the more he will be asked. The more unconditional his support of his staff seems, the less the incentive for good performance. The more widely spread his trust, the less its value. These are obvious points familiar to any executive, but under the crush of daily emergencies and decisions in the presidency, they become more important and easier to overlook.
2. Selectivity needs to be a part of self-awareness. Because the president can personally administer only a few issues and can manage only a handful of aides, he needs to know the one or two things that matter to him most, subject to changing circumstances. Without this selectivity, there are no goals to work toward and disorientation quickly spreads throughout his office and administration. Most of the rest of his presidency, to put it bluntly, will consist of managing for damage control in the history books.

3. *Self-awareness and selectivity have to be linked to a consciousness of the bureaucratic terrain in his own office through which the president is moving.* A presidential bureaucracy—rather, a collection of bureaucracies—seems to be with us to stay, and its workings pose special hazards for the president. The following are perhaps the most common hazards:

- Presidential staffs tend to bring into the presidency conflicts and controversies raging among departments, congressional committees, and interest groups. This means that the president, unless he makes a conscious effort to the contrary, is likely to be closely identified with the inevitable ebb and flow of debate that occurs on complex policy matters—a tentative finding this way, an interim decision that way. Even the most firm-minded president is bound to appear indecisive in this situation. Perhaps the best safeguard is for the president to allow a great deal of “precooking” of policies some distance away from him, with low-visibility participation by presidential staff members to protect his interests. This approach seems most appropriate for the bulk of issues that are not among his few priority concerns.
- Each presidential staff, in order to carry weight inside the office and with outsiders, seeks to invent ways that allow it to claim that its members are acting “at the direction of the president.” And each such invention ties the president more closely to the work of unfamiliar helpers. Because all these people have a stake in generating presidential decisions, his influence and public standing are likely to be on the line in more places than he might wish. A president can help himself by making sure that issues coming to him really are matters on which he, rather than someone else, has to make a formal decision. The exact machinery is less important than the need for the president to choose some particular system—an administrative secretary, a chief of staff, a secretariat, a formal procedure of decision memoranda—for disciplining the way he gets into decisions and for keeping tabs on what he, rather than anyone else, wants done. It is only the president who, by his own actions, can enforce and sustain any such system.
- The presidential bureaucracy has a natural desire for self-preservation. Internal conflicts which would convey more information to the president by being openly fought out tend to be submerged in *sub rosa* court politics inside the White House and the rest of the EOP. Rather than a free-for-all among presidential staffs, what typically exists is a kind of truce by which each staff settles for a piece of the president’s attention and decision-making. This hardly helps the president to know what is going on. To overcome this tendency the president, again by his own behavior, needs to make it clear that he expects in-house disagreements, that suppression of contrary views is punished, and that all can live to fight another day—as long as the battle does not continue once the president has made up his own mind. The same staff procedures used to keep the president out of unnecessary decisions can probably be used to create a fair hearing and due process for such internal conflicts.
- Because of the trends identified earlier, the presidential office tends to be divided into two large hemispheres: a political technocracy and

a policy technocracy. On almost every conceivable issue the president needs to hear, unvarnished, the facts from both sides. In general, the competition between the two hemispheres for presidential attention has tended to become unequal as media attention has increased and political fragmentation grown. Political staff work tends to drive out longer-term, institutional interests in policy and administration. This tendency is amplified if the president makes it clear that he gives serious attention only to his short-term personal stakes in the issues coming before him.

4. Paradoxically, one of the most effective ways for the president to manage his own office is through the use of his appointees in the departments and agencies. If these department heads are known to have intimate knowledge of the president's thinking, and therefore seem likely to be backed by the president in disputes with White House staffers, White House aides will likely be kept in their proper place as assistants to the president rather than as assistant presidents.

Unfortunately, every new administration seems to raise false expectations by proclaiming that the president intends to manage through his cabinet officers, or words to that effect. In fact, their individual frames of reference are too narrow to give the president all the perspective he needs, and their collective interests are a fiction without active presidential support and guidance. Hence, the president must manage through both his own office's bureaucracies *and* his department and agency heads. In general, the cabinet is a communication—not a decision-making—device. It carries information to and from the president. At their best, cabinet officers help the president by telling him things he would not otherwise hear, by conveying his sense of a unified administration, by keeping presidential staff in line. It is the president's management job to see that when department and agency heads fight among themselves—as they inevitably will—it is done in front of him and tells him something worth knowing.

5. In addition to his political staffs, policy offices, and cabinet officers, the president typically has access to his closest personal friends: the Kitchen Cabinet. Experience suggests that it is safest to keep these advisers outside his office staffs or official departmental family. The reason is simple and practical. If the president is to protect himself as he manages, any other person must be dispensable. Because not everyone wishes the president well, putting a close personal friend in an official position leaves both that person, and through him, the president, vulnerable. Informal advisers attract less attention, are changed more easily, and perform their greatest services precisely because they are not caught up in the daily grind of government machinery. Exceptions can, of course, be found; President Eisenhower and President Kennedy made effective use of their brothers in official positions, as did President Truman of his friend John Snyder. But for every Snyder there is a Bert Lance, and it is just as well to recognize the risks at the outset. Only the president can decide whether it is worth having someone so close that his presidency will be gravely wounded through that person's loss to scandal, the appearance of scandal, or larger policy ends.

Cautions about these five hazards add up to an approach to presidential management that tries to use the various tensions and counter-pressures inherent in the job. The counter-pressures within his own office staffs, between them and cabinet officers, and between all these and the president's closest personal loyalists are opportunities as well as constraints. A president with some self-awareness can use this cat's cradle of tensions to help see to it that he is at the center of things when he wants to be and "out of it" when he needs to be. The management aim cannot, therefore, simply be to create a unified team; it must be to create the counter-pressures that will be useful to him, lest he become victimized by his own helpers.

Others, no doubt, will see things differently, but this much seems clear: a modern president who cannot govern his own office is unlikely to be able to govern anything else.

ENDNOTES

1. A brief description is contained in National Academy of Public Administration, *A Presidency for the 1980s* (Washington, DC: NAPA, 1980), Chapter 2.
2. The current advisory mechanisms available to the president are surveyed in Richard Pious, *The American Presidency* (New York: Basic Books, 1979), Chapters 7–10.
3. From the Wayne Coy Paper, "Memorandum of October 26, 1940," in the Franklin D. Roosevelt Presidential Library, Hyde Park.

Reading 23

Presidential Appointments and the Office of Presidential Personnel

BRADLEY H. PATTERSON AND JAMES P. PFIFFNER

In order for a new president to take effective control of the government, he or she must appoint people to head the executive branch. Consequently, one of the first things that a president-elect must worry about is having in place an effective personnel recruitment operation. This function is so important that the planning for it must begin well before the election, even though there is a danger that setting up the operation may appear presumptuous if news of it gets into the press. As Pendleton James, President Reagan's personnel recruiter in 1980–81 said, "The guys in the campaign were only worried about one thing: the election night. I was only worrying about one thing: election morning."¹ "Presidential personnel cannot wait for the election, because

presidential personnel has to be functional on the first day, the first minute of the first hour.” But “it has to be behind-the-scenes, not part of the campaign and certainly not known to the public.”²

This essay will present an overview of the Office of Presidential Personnel (OPP) and how it functions during the transition and early months of a new presidential administration. We will first set out the scope of the job by specifying the number and types of political appointments for which OPP is responsible. Next, some background on how the office has developed in recent years will be presented along with the responsibilities of its director. Each administration’s OPP faces predictable challenges in the form of pressures for appointments from Congress, the campaign, and cabinet secretaries; these typical areas of concern will be examined. Our conclusion is that the responsibilities of the OPP are crucial to the success of each president and that the better prepared the new director is, the better he or she will serve the president.

SCOPE OF PRESIDENTIAL APPOINTMENTS

What categories of positions are filled by political appointment, and how many positions are there in each category? The following table lays out different types of presidential appointments and the number of positions in each category.

TABLE 23.1

Presidential Appointments and the Office of Presidential Personnel

I. Full-time presidential appointments	
A. PAS appointments requiring Senate confirmation (e.g., cabinet secretaries, agency heads, ambassadors)	1,177
B. “PA” presidential appointments not requiring Senate confirmation	21
II. Full-time political appointments (Appointed by agency heads but only with White House approval)	
A. “Schedule C” positions, mid-level management and below (GS 1–15)	1,428
B. Non-career senior executive service, upper-level management	796
III. Part-time presidential appointees (advisory boards and commissions)	
A. “PAS”—requiring Senate confirmation	579
B. “PA”—not requiring Senate confirmation	2,509
IV. White House staff positions (not handled by OPP)	
A. Receiving formal, signed commissions from the president (assistant and deputy assistants to the president)	154
B. Appointed under presidential authority (Special assistants to the president and below)	790
Total positions that can be filled by the White House in a typical term	7,454

Source: Adapted from Bradley Patterson, *To Serve the President* (Washington, D.C. Brookings, 2008), pp. 93–94.

The “PAS” and “PA” positions in Category I, most federal judgeships (Category I), and the memberships on part-time advisory boards and commissions (Category III) are created in statute. (Ambassadorships and a few judgeships are authorized not in statute but in the Constitution itself.) The number of statutory posts can be increased or decreased only by congressional action. The president personally approves each of these appointments.

The Senior Executive Service (SES) is the corps of professional federal managers just below the level of assistant secretary. By law, only 10 percent of the positions in the SES may be filled on a noncareer basis. A department or agency head may propose a political candidate to be appointed to such a position, but it is also standard practice that each noncareer SES appointment is to be cleared with the director of the OPP. Once White House approval has been signaled, the Office of Personnel Management (OPM) grants “noncareer appointing authority” to the agency for the placement.

Schedule C positions are established by departments and agencies, but each such post must first be certified by the director of the Office of Personnel Management as being “policymaking” or “confidential.” Once a Schedule C job is thus authorized, the department or agency head may appoint a person to the post. It has been standard presidential practice since 1981, however, that the White House—usually the director of the Office of Presidential Personnel—approves each Schedule C appointment. That practice is likely to continue.

While both Schedule C and noncareer SES appointees are employees of the agencies in which they work, with their service being at the pleasure of the respective agency heads, the White House cannot be oblivious to the quality and the commitment of these noncareer people.

DEVELOPMENT OF THE OFFICE OF PRESIDENTIAL PERSONNEL

Presidents have made political appointments of the officers of the executive branch of government ever since the administration of George Washington. Throughout most of the 19th century the “spoils system” dominated the executive branch, with much of the whole federal workforce changing upon the election of a new president from the other political party. After the Pendleton Act of 1883 created the merit system, the executive branch was gradually changed so that civil servants were hired by the Civil Service Commission and only the top levels of the government would be politically appointed.

But for most of the century after the Pendleton Act, the White House had no institutional capacity to recruit political appointees. The cabinet and top levels were of course determined by the president, but lower levels were often influenced heavily by patronage demands originating in political parties and Congress. As the scope of government expanded and the technical complexity of the functions of the government increased, the qualifications for appointees began to change to include technical and policy expertise as well as political loyalty. However, the ability of the White House to recruit actively slowly developed over time.

After World War II, the White House capacity to control appointments for the president was gradually created. President Truman was the first president to assign one person the duty to take care of all presidential appointments, and President Eisenhower used a special assistant for personnel management. President Kennedy designated three people to conduct his “talent hunt” for the “best and brightest” to serve in his administration. Kennedy did not expect political appointments to be too much of a challenge, but his perspective changed after he assumed office. “I thought I knew everybody and it turned out I only knew a few politicians.”³

The presidential capacity to recruit political appointees took a jump in professionalism when Fred Malek became President Nixon’s director of the White House Personnel Office in 1970 and established an executive search capacity with about 30 people working for him.⁴ The Malek operation handled all presidential appointments but not schedule Cs.

President Carter was the first president to begin planning for personnel recruitment before the election, but conflict between the campaign operation (headed by Hamilton Jordan) and the transition preparation (headed by Jack Watson) foreshadowed an uncoordinated personnel recruitment process once he was in office. In addition, Carter intended to delegate to his cabinet secretaries broad authority to recruit their own management teams, as Nixon had initially.

Pendleton James was put in charge of the incoming Reagan administration’s personnel recruitment operation and undertook systematic preparations in the summer of 1980. The incoming administration concluded that Nixon and Carter had delegated too much recruitment authority to their cabinet secretaries and had abdicated White House control. They thus established immediately after the election that the Office of Presidential Personnel would control all presidential appointments (PAS). But in addition, they decided to establish White House control over noncareer Senior Executive Service (SES) appointments and Schedule C appointments, which are technically appointed by cabinet secretaries and agency heads. Pen James was given the title of assistant to the president (the highest designation of White House staffers) and an office in the West Wing. James maintains that these two indicators of status are crucial for the authority necessary to do a good job of presidential recruiting.⁵ The OPP under Reagan used ideological agreement with the president as a major criterion for selection of appointees. At the beginning of the administration, James had more than 100 people working with him, including volunteers.

President Bush continued to control appointments in the White House and chose Chase Untermeyer to head his OPP. The main criterion for a Bush administration appointment was personal loyalty to George Bush, and two special groups were set up to assure that demonstrated loyalty was rewarded. The president’s nephew, Scott Bush, was put in charge of drawing up lists of those who had worked in the Bush campaign whose names would be sent to departments to be appointed to Schedule C positions. The president’s son, George W. Bush, was put in charge of a group called the “Silent Committee,” which drew up lists of those who had been loyal to George Bush over his career and made sure that they were “taken care of” in the appointments process.⁶

President Clinton continued White House control of presidential appointments, but his Office of Presidential Personnel got off to a slow start when its initial director, Richard Riley, after several weeks on the job, was named by Clinton to be secretary of education. OPP was then headed by Bruce Lindsey who was also responsible for many other duties for Clinton and could not devote the full time necessary for the job. The office was finally headed by Robert Nash who continued in the position through most of the administration. The hallmark of the Clinton personnel recruitment effort was “diversity,” and they were successful in appointing greater numbers of women and ethnic minorities than any other administration had.

SETTING OUT THE GROUND RULES

Inauguration day arrives. Lucky is the personnel director who will even have time to witness the inaugural parade, because of the other parade—of supplicants—into the director’s White House reception room. Typically, the director’s 100-person team of assistants during the transition moves over to the White House too. What have heretofore been plans now become actions. The months-ago calculations must now be transformed into decisions.

In the new White House itself, the director of the Office of Presidential Personnel will want to make sure that several traditional rules are reaffirmed:

1. No other person or office in the White House is to make personnel *commitments*. The new presidential personnel specialists will likely turn to the domestic or economic or national security offices in the White House for advice about the selection of candidates. The political and legislative liaison staffs will funnel in streams of additional resumes from their own respective constituencies. Other members of the new White House staff, fresh from the campaign, will feel obligated to help their erstwhile buddies find jobs in the new administration. The first lady will refer to the director the mail from office-seekers who are writing to her. But when it comes to decision-making, there can be only one point from which the final recommendation goes to the president: the director of the Office of Presidential Personnel.
2. Cabinet heads are to be informed: The White House is to govern the selection of the political appointees in the departments “all the way down.” Some new cabinet and agency heads likely will want to boast that the president has given them free hand to pick departmental subordinates, but that will simply not be the case; it is clearly in the interest of the director of the Office of Presidential Personnel to make sure of this. What is meant by “all the way down”? It means that not only does the White House make the final decision on presidential appointments within each department, but that the director of the Office of Presidential Personnel usually signs off on *all* the political appointments that a department or agency head wishes to make, i.e. on Schedule C and noncareer SES positions as well. Does that mean every single one?

President Bush's second presidential personnel director, Constance Horner, warns:

Absolutely—every single one. I was quite fierce about this, because I saw it as a process of building future leadership. So it mattered to me what the quality of the appointee was, and it mattered to me what their decisional level was, and what their loyalty was, and their intellectual capability.⁷

In practice, this rule means that the director will engage in negotiations with the cabinet or agency head and come to an (almost always) amicable agreement as to the person to be chosen.

The first weeks and months of a new presidential personnel director's tenure will be a period of constant, supercharged pressures, sticky, tangled bargaining, of making as many folks disappointed/mad as one makes appreciated/pleased—and overall a smattering of chaos. The OPP staff must be competent enough and energetic enough to push its way through the intricate negotiations and preparations that are needed to put the director in a position to make final recommendations to the president. In each case, all eight of the previously described sets of criteria must be applied. The White House Political Affairs Office will help in ascertaining from party headquarters how active candidates were in the campaign and how much reward is appropriate. The Legislative Affairs Office will assist with informal checks on the Hill. (If federal judges are being proposed, it is the counsel, rather than the director of the Office of Presidential Personnel, who will carry the prime responsibility for the necessary vetting of judicial candidates.)

In many instances, the OPP director will insist on interviewing some candidates personally: to satisfy himself or herself that the men and women being recommended to the president are of top quality. The director will ask the final question:

Are there ANY skeletons in your closet? I want to know. And if you DON'T reveal them now, and leave me to make a judgment call not knowing about them, finding some way to handle them, I will STILL find out about them, and then you are out, REALLY OUT.⁸

The personnel director must ascertain from the president the answers to three procedural questions: (1) whether the president wants a single name proposed for each position, or a group of alternative candidates (with one of them recommended by the director); (2) to what extent the president wants the vice president consulted about personnel recommendations; and (3) what the role is to be of the White House Chief of Staff on personnel matters. With respect to the third point, Untermeyer's memoranda to the president would begin "The Chief of Staff and I recommend . . ."

The president's initials on a personnel memorandum are only the intermediate step in the process. Next are the formal clearance procedures: It is at this point that the FBI starts its security and suitability investigation (which could take weeks), and the candidate produces his or her financial and tax records in minute detail. It is the counsel, not the personnel director, who will scrutinize the resulting reports and who will notify the OPP director if there is anything

negative in those findings that would affect the candidate's suitability. If a candidate's financial holdings, for instance, reveal a possible conflict of interest with the job for which he or she is destined, the counsel or the independent Office of Government Ethics will require the candidate to work out a divestiture or similar "insulating" arrangement with the ethics officer of the department involved.

During this investigative period, the position will appear to be still unfilled—and thus may attract new supplicants (and their supporters). It is difficult to tell them that the job is, in fact, no longer available. A final memorandum is sent to the president recommending his signature on the nomination papers. When that happens, the papers are dispatched to the Senate, and a White House press announcement is released. These actions mark the conclusion of the recruitment phase for presidential appointments that require Senate confirmation.

THE CHALLENGES AND PRESSURES FACING THE DIRECTOR OF OPP

One of the first challenges for the Office of Presidential Personnel is to deal with the volume of resumes and requests for appointments that flood into the White House immediately after the election. In recent administrations, this flood has reached 1,500 per day.⁹ The Bush administration had received 16,000 before the inauguration and by the end of May 1989, it had received more than 70,000 applications and recommendations (though 25,000 may have been duplicates).¹⁰

According to Pendleton James, the pressures on the OPP director are tremendous. "There's not enough time in the day to get it done . . . my job was like drinking water from a fire hydrant. There is so much volume coming at you. . . . There just isn't enough time."¹¹ He continued, ". . . being the head of presidential personnel is like being a traffic cop on a four-lane freeway. You have these Mack trucks bearing down on you at sixty miles an hour. They might be influential congressmen, senators, state committee chairmen, heads of special interest groups and lobbyists, friends of the president's, all saying 'I want Billy Smith to get that job.'"¹²

Pressure from Congress is considerable. Pen James said that he received some advice from the legendary Bryce Harlow, who had run congressional relations for President Eisenhower during the Reagan transition. Harlow told him, "The secret to good government is never, ever appoint a Hill staffer to a regulatory job. That Hill staffer will never be the President's appointee. He or she will always be the appointee of that congressman or that senator who lobbied you for that job. And they will be beholden to that senator or to that congressman." After James's talk with Harlow, a senator came to talk with James, and after mentioning that 64 of the Reagan nominations had to go through his committee, demanded that several of his staffers be appointed to regulatory positions. Remembering Harlow's advice, James went back to the White House and asked chief of staff James Baker how to handle the situation. Baker said, "Give it to him." Some pressures from Congress cannot be ignored.¹³

Some friends of the president may have strong claims based on their political support but may not be qualified for high level managerial positions. This is a predictable challenge for the OPP director. But there is an art to

dealing with the people who must be turned down for positions with the new administration. According to Constance Horner, one possibility is to appoint people to part-time and honorary positions. "... for every person you choose you're turning down ten, fifteen, twenty people who want the job. ... [T]here is no way to do this and make everybody happy ... there are numerous part-time boards and commissions that offer advice on environmental matters where people come to Washington four times a year and they discuss the issues and make recommendations."¹⁴ So if a person is not qualified for a position of great authority, Chase Untermeyer advises: "That person can also be rewarded in other ways with advisory commissions or invitations to State dinners or other things that are within a gift of the president to do short of putting that person in charge of a chunk of the federal government."¹⁵

While all PAS appointments are constitutionally the president's decision, the practical and prudential approach to sub-cabinet appointments (deputy, under, and assistant secretaries) is not quite so clear-cut. In the 1950s and 1960s, when the White House did not have the recruitment capacity it has now, it was most often the cabinet secretary who suggested to the president the preferred nominee, and most often the president went along. In battles between the White House staff and the cabinet secretary, most often the cabinet secretary won.¹⁶

From the perspective of the cabinet secretary, the issue is one of building a management team for the department. Each person has to be chosen carefully, with full consideration for how that person fits into the structure and how they will get along with the others on the team. Those in the cabinet are suspicious that the White House Office of Presidential Personnel will weigh very heavily the political service of the appointee and will neglect the expertise, managerial ability, and compatibility of the nominee with the other executives in the department. Frank Carlucci, secretary of defense in the Reagan administration, advised new cabinet members: "Spend most of your time at the outset focusing on the personnel system. Get your appointees in place, have your own political personnel person, because the first clash you will have is with the White House personnel office. And I don't care whether it is a Republican or a Democrat. If you don't get your own people in place, you are going to end up being a one-armed paper hanger."¹⁷

The White House staff has just the opposite perspective. They are afraid that cabinet secretaries are likely to recruit people who are loyal to the cabinet secretary but not necessarily to the president. For this reason, the Reagan administration decided to control political appointments tightly in the White House. Pen James explained that earlier presidents had failed to make sure that sub-cabinet appointments were controlled by the White House. "Nixon, like Carter, lost the appointments process."¹⁸ One danger is that a newly selected cabinet nominee will ask the president for the authority to appoint his/her own team. But agreeing to that is a big mistake. So, according to James,

We didn't make that mistake. When we appointed the cabinet member, he wasn't confirmed yet. We took him in the Oval Office; we sat down with the President. ... And we said, 'All right ... we want you to be a member of the cabinet but one thing you need to know before you accept is we, the White House, are going to control the appointments. You need to now that.'¹⁹

Each new administration must reach a balance between the OPP and cabinet secretaries about recommending nominations to the president. What is important is that this accommodation be made explicitly and at the direction of the president rather than through drift.

In recruiting political appointees, the primary criterion is loyalty, but the definition of loyalty is not a fixed target. Some interpret loyalty as service to the political party over the years; others see it as ideological compatibility with the president; others see it as personal service to the candidate in the past or in the most recent campaign. Others argue that competence, professionalism, and the ability to manage ought to be primary criteria for appointment.

According to Chase Untermeyer, "... the primary responsibility of the personnel office is to get those who are loyal to the president," rather than appointing a person who is loyal "to the person who hired you such as a cabinet secretary or such as an important senator who insisted on your getting a job."²⁰ This may mean turning away loyal partisans from previous administrations. Untermeyer was sympathetic to the "baleful looking veterans of the Nixon and Ford administrations, and even in one case the Eisenhower Administration, who felt that because they had been wonderful civil servants and devotees of George Bush that they, of course, would be prime candidates to be in our administration." But the political reality was that "our job was to find places for people who had worked in the 1988 campaign."²¹ This calls attention to the strains created during a transition to a new administration of the same party. The new president may want his own people and thus have to "throw out" of office loyal incumbents of the same party.²²

Chase Untermeyer warns that some newly appointed cabinet secretaries who are politically sophisticated and come to talk with the director of OPP "pre-armed with lists of those whom they want in various positions" and will refer to them as "my appointments."²³ So it is important for OPP to have an "inventory of names" of those who helped in the campaign when the cabinet secretary comes to talk about appointments. The secretary can then be told: "... while you were in your condo in Palm Beach during the New Hampshire primary, these people helped [the president] get elected so you could become cabinet secretary."²⁴

Fred Malek, the head of the White House Personnel Office for President Nixon, has a slightly different perspective on loyalty. He argues that loyalty is certainly central in making political appointments, but construing that loyalty too narrowly might prematurely narrow the pool of talented candidates. "... Don't assume that somebody who hadn't worked for you in the past isn't loyal to you. Maybe they didn't know they could work for you. Maybe they haven't been involved in politics but there can be developed loyalty; it doesn't have to be proven loyalty."²⁵

"Too many administrations, *too many* administrations get staffed by the campaign. The qualities that make for excellence in a campaign are not necessarily the same as make for excellence in governing. . . . To govern you need, I think, people who are of a somewhat more strategic and substantive bent than you necessarily need in a campaign. Campaigns are more tactical. . . . In governing I think you need a better sense of strategy and a better sense of management."²⁶

Thus many tough personnel choices will have to be made by the director of OPP, and many of them will hinge upon which kind of loyalty to weigh more heavily. But it should be kept in mind that the long term success of the president's administration will depend heavily upon the substantive competence of the people appointed to manage the departments and agencies of the executive branch.

CONCLUSION

A presidential candidate and the director-to-be of presidential personnel have to reflect that they face a daunting responsibility. Within a few short months after taking office, the winner must select, persuade, thoroughly evaluate, and install some 2,000 extraordinarily capable men and women who will suddenly have to take on the management of the most complicated and demanding enterprise on earth: governing the United States. A few of that cohort may be experienced in this endeavor; most, though, will be untutored. Many will accept financial sacrifice and leave quiet, comfortable lives only to be swallowed up in what they will rapidly discover is a roiling tempest of competition, cacophony, and contention: the environment of public life. They will be scrutinized and criticized from all sides; pressures and demands on them will be merciless, praise and recognition meager. A few will stumble; some will become world-famous. All of them, laggards and unsung heroes alike, will see themselves collectively vilified as "power-hungry Washington bureaucrats," but they must soldier on, helping faithfully to execute the laws, and to "promote the general welfare" unto the least of their fellow citizens. They will need—and almost all of them will earn—the president's loyalty and support. In the end, they will have had the opportunity—and the honor—of adding to the promise and to the goodness of their country, and of the world itself. Can there be a more ennobling challenge?

ENDNOTES

All quotations, unless otherwise specified, come from transcripts of the White House Interview Program and were conducted by Martha Kumar in 1999 and 2000.

1. James interview, p. 6.
2. Pendleton James interview, p. 21.
3. Quoted in Calvin Mackenzie, *The Politics of Presidential Appointments* (NY: The Free Press, 1981), p. 83.
4. Malek interview, p. 3.
5. James interview, p. 10.
6. Untermeyer interview, pp. 25, 26, 41.
7. Author's interview with Constance Horner, September 29, 1997.
8. Jay Matthews, quoting Frederick W. Wackerle, an executive recruiter with thirty-one years experience, in "Are There ANY Skeletons in Your Closet," *The Washington Post*, May 2, 1995, p. D-1.
9. James P. Pfiffner, *The Strategic Presidency*, 2nd ed. (Lawrence, KS: University Press of Kansas, 1996), p. 57.
10. See Pfiffner, *The Strategic Presidency*, p. 138.
11. James interview, p. 38.
12. James interview, p. 7.

13. James interview, p. 12.
14. Horner interview, pp.12–13.
15. Untermeyer interview, p.12.
16. Pfiffner, *The Strategic Presidency*, p. 66.
17. Pfiffner, *The Strategic Presidency*, p. 66.
18. Pfiffner, *The Strategic Presidency*, p. 67.
19. James interview, p. 6.
20. Untermeyer interview, p. 11.
21. Untermeyer interview, p. 37.
22. Pfiffner, *The Strategic Presidency*, p. 138.
23. Untermeyer interview, p. 9.
24. Untermeyer interview, p. 10.
25. Malek interview, p. 14.
26. Malek interview, p. 13.

Reading 24

The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory

RICHARD W. WATERMAN

The administrative presidency strategy originally was initiated by the Richard M. Nixon administration as an attempt to accomplish administratively what it could not do legislatively (Nathan 1983; Waterman 1989). While the idea of the administrative presidency remains politically controversial, it is mostly based on solid constitutional principles. The strongest constitutional foundation is the president's ability to appoint loyalists to positions throughout the bureaucracy. While the debate over whether a president should promote loyalty rather than competence as the main criterion for making appointments is certainly controversial, there is a sound constitutional basis for this practice, even when presidents use their recess power to make late-term appointments.

Presidents have been on solid legal ground as well in removing officials who were judged to be insufficiently loyal to them or to their policies. As long as these officials held appointments that ultimately were responsible to the president and served at the president's pleasure, they could be legally subject to removal at any time. Abuses of power occurred, however, when the Nixon administration attempted to remove civil servants or to deploy them to remote locations. Later, though, Ronald Reagan was able to use newly emerging powers emanating from Jimmy Carter-era civil service reform legislation to transfer

career employees to less amenable locations, which forced them to resign if they wished not to relocate. These steps, taken during the Reagan administration, while politically controversial, were nonetheless legal, and the results often advanced the policy interests of the president. While controversial and maybe even undesirable, these personnel actions were legally permissible and fell within the ambit of executive authority delegated by the Civil Service Reform Act.

A different idea, however, arose in the form of the unitary executive theory. It posits that the president has sole responsibility for the control and maintenance of the executive branch, further extending the debate on the scope of the president's removal power (Calabresi and Yoo 1997, 2003; Fitts 1996). Proponents of the theory have sought to repudiate the Supreme Court's decision in *Humphrey's Executor v. United States* (1935), which prohibits presidents from removing officials, such as the commissioners of the independent regulatory commissions, from office for political reasons. The unitary executive theory proclaims the president to be the sole responsible official for all that occurs within the executive branch. In consequence, all of the executive branch must be responsible to its chief executive. This new theory of presidential leadership, propounded in some conservative legal circles (the Federalist Society) and regularly cited by the George W. Bush administration in signing statements, has been presented as a legal justification for more expansive presidential power. In particular, it has increased the traditional authority presidents have employed since Nixon's presidency with regard to the administrative presidency strategy. It raises serious legal questions about the boundaries of presidential power and Congress's ability to limit presidential discretion. By asserting that Congress does not have the right to enact laws that limit the president's powers as chief executive or commander in chief, the unitary presidency provides presidents with broad unchecked power in the personnel removal area. This is but one way in which the unitary executive theory changes what, to date, has been a practice based on accepted constitutional premises.

Another component of the administrative presidency approach is the use of the budget to control agencies. Presidents are on solid constitutional ground when they do so in consort with Congress by approving new spending limits in congressionally enacted legislation. Presidents also can and have aggressively used the provisions of the Budget and Impoundment Act of 1974 to defer or rescind spending. While the 1974 law outlawed impoundments—whereby a president refuses to spend congressionally allocated funds without congressional permission—it also created the deferral and rescission process, which provides presidents with extraordinary flexibility to control bureaucratic spending, particularly when the president and Congress are in the hands of the same political party. The Reagan administration flooded Congress with such requests. It also used the same law's reconciliation process to force Congress to accept budget reductions the administration favored. Thus, presidents have a series of constitutionally and legally prescribed ways to control spending on bureaucratic agencies.

The unitary executive theory and other instruments of unilateral power further expand the realm of presidential power. In his extravagant use of

signing statements, for example, George W. Bush unilaterally created what essentially amounted to a line-item veto. This allowed the president to sign a particular bill and then quietly, in a signing statement that generally received less public scrutiny, assert that the president would ignore certain provisions of the bill with which he disagreed. This mechanism provides yet another means of skirting the constitutional structure and avoids the perils of governing in a world of separated powers. If a president does not like a bill's provision, rather than withhold funding, presidents can merely assert that they will not enforce the law, a dubious claim given the mandate of their oath of office and their duty to "take care" that laws are faithfully executed. Although much time and effort has been focused on the constitutional mechanisms at the president's disposal, to date, less attention has been paid to the implications of this new and expansive theory of presidential power. What, then, are the implications of the greater use of unilateral power and the unitary executive theory for the administrative presidency?

UNILATERAL POWER AND THE ADMINISTRATIVE STATE

Presidents have consistently used their unilateral powers to influence the bureaucracy. Presidents can create agencies through executive orders. According to Howell and Lewis (2002) and Lewis (2003), when they do so, they create structures that are more amenable to presidential control. On the other hand, agencies tend to be more insulated from presidential power when they are created by Congress.

Presidents also use executive orders to directly influence policy making at the administrative level. Reagan used executive orders to devise a system, managed through the Office of Management and Budget, by which all major rules and regulations had to pass a cost-benefit test before they could be implemented. Not surprisingly, most proposed regulations were rejected because of cost concerns, particularly in policy areas that were not favored by the Reagan administration (e.g., the environment). Reagan also used an administrative order to set up a more efficient central clearance procedure for all new rules and regulations, again monitored by the Office of Management and Budget and again generally stifling new policy initiatives. Reagan's innovations, with some modifications, have been enacted and implemented by his successors, thus establishing clear precedents for presidential action using executive orders to control the bureaucracy.

Since the Reagan administration, presidents also have made greater use of presidential signing statements. Journalist Charlie Savage, first in a series of articles that garnered the Pulitzer Prize, then later and more expansively in a book (Savage 2007), had noted that presidents use signing statements to directly inform the bureaucracy as to how it is expected to enforce laws passed by Congress. In many cases, bureaucrats are specifically advised *not* to enforce the law. This goes far beyond the practice of using executive orders

to prescribe who in the bureaucracy is responsible for policy implementation, a long-standing practice. The use of signing statements essentially orders bureaucrats not to enforce the law, on the authority of the president.

Signing statements provide a bold new mechanism for controlling the bureaucracy, one with dubious constitutional support. Savage writes:

Among the laws challenged included requirements that the government provide information to Congress, minimum qualifications for important positions in the executive branch, rules and regulations for the military, restrictions affecting the nation's foreign policy, and affirmative action rules for hiring. In his signing statements, Bush instructed his subordinates that the laws were unconstitutional constraints on his own inherent power as commander in chief and as head of the 'unitary' executive branch and thus need not be obeyed as written. (2007, 237)

Bush also said he "could bypass laws requiring him to tell Congress before diverting money from an authorized program in order to start a secret operation, such as funding for new 'black sites,' where suspected terrorists were secretly imprisoned around the world."

While scholars focus on the traditional mechanisms of the administrative presidency strategy, a revolution of sorts has occurred without much notice or comment, one that employs unilateral powers to impact bureaucratic behavior in ways that often are not subject to public scrutiny. With laws passed and monies appropriated, most policy makers turn their attention to other issues, not noticing the significance of the president's signing statement declarations.

The main theoretical basis for such broad presidential action is the unitary executive model. The theory posits that, by creating a single president, the founders intended for the president to have complete and unfettered control over all aspects of the executive branch. This reasoning ignores the clear constitutional powers that Congress possesses over the executive branch, such as its legislative and appropriation powers, as well as those inferred from the "necessary and proper" clause of Article I of the Constitution. It also threatens the ability of the legislative branch to perform meaningful oversight, as the president can order bureaucrats to refuse to comply with congressional requests for information. Particularly interesting is the theory's central assumption that any law passed by Congress that seeks to limit the president's ability to communicate or control executive branch relations is unconstitutional and therefore need not be enforced. The theory also posits that the president has the same authority as the courts to interpret laws that relate to the executive branch. Thus, the president can interpret the law and unilaterally decide to ignore it, without legal sanction or redress.

In this process, legal memoranda written by the Justice Department's Office of Legal Counsel provide presidents and their executive branch subordinates with a legal shield from prosecution. Any official who is challenged by Congress can assert that he or she is following a direct dictate from the president and that it is the Office of Legal Counsel's opinion that it is legal to do so.

This new and expanded use of presidential power represents a quantum expansion of the president's administrative authority, moving us far beyond the constitutionally prescribed boundaries of the initial administrative presidency approach to control of the bureaucracy. Initially, the administrative presidency model provided presidents with greater responsiveness at the bureaucratic level. As Moe (1985) correctly notes, this is both a reasonable and a rational response for presidents who seek greater control of the bureaucracy. As much empirical research has demonstrated, the tools of the administrative presidency indeed increased presidential power and influence (see Wood and Waterman 1991).

But if the ideas of the administrative presidency are conjoined with the expansive claims of inherent presidential power as represented by the unitary executive theory, then the concept of presidential accountability will be sacrificed. In terms of future empirical research on the bureaucracy, then, scholars need to pay greater attention to the content of presidential signing statements and executive orders, as well as to the number of citations of the unitary executive theory as a justification for presidential control. They also need to scrutinize the opinions of the Justice Department's Office of Legal Counsel—that is, when these opinions are available for public scrutiny. Unilateral power and the unitary executive represent the new frontier of presidential attempts to control the bureaucracy. While the George W. Bush administration greatly expanded presidential power in this realm, it is likely that his successors (from both parties) will invoke these precedents, when politically convenient, to further maximize their authority—that is, unless the courts decisively reject the assumptions of the unitary executive. Greater attentiveness to this important change in presidential-bureaucratic relations should be high on the agendas of those who focus on the nexus between the presidency and the executive branch.

REFERENCES

- Calabresi, Steven G., and Christopher S. Yoo. 1997. "The Unitary Executive during the First Half-Century." *Case Western Reserve Law Review* 47: 1451–61.
2003. "The Unitary Executive during the Second Half-Century." *Harvard Journal of Law and Public Policy* 26: 668–801.
- Fitts, Michael A. 1996. "The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership." *University of Pennsylvania Law Review* 144: 827–902.
- Howell, William G., and David E. Lewis. 2002. "Agencies by Presidential Design." *Journal of Politics* 64: 1095–114.
- Lewis, David E. 2003. *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997*. Stanford, CA: Stanford University Press.
- Moe, Terry M. 1985. "The Politicized Presidency. In *The New Direction in American Politics*, edited by John E. Chubb and Paul E. Peterson. Washington, DC: Brookings Institution, 235–71.
- Nathan, Richard P. 1983. *The Administrative Presidency*. New York: Wiley.
- Savage, Charlie. 2007. *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. Boston: Little, Brown.
- Waterman, Richard W. 1989. *Presidential Influence and the Administrative State*. Knoxville: University of Tennessee Press.
- Wood, B. Dan, and Richard W. Waterman. 1991. "The Dynamics of Political Control of the Bureaucracy." *American Political Science Review* 85: 801–28.

The Separation of Powers

Although the focus of this volume is on the presidency, it is obvious from the readings so far that the president does not operate alone in the U.S. government. In writing the Constitution, the Framers created a system that was explicitly designed to thwart the accumulation of power. According to James Madison in *Federalist 51*, “ambition must be made to counteract ambition.” In fact, they expected that Congress would dominate the national government. When structuring the system, however, they created an executive branch that was independent of the legislature and potentially able to act as a counterweight to legislative power.

But historical circumstances change, and the transformations brought to the United States by the industrial revolution as well as the crises of the mid-20th century—World War I, the Great Depression, World War II, and the Cold War—concentrated power in the executive branch. Despite this general trend, the power of the national government has always been in tension, with either Congress or the president leading the national agenda, depending on the particular historical circumstances. The selections in this section focus attention on this shifting equilibrium in the balance-of-powers system in the United States. Debates over institutions often center around whether the president or Congress has the edge at any given time, and whether changes in the structure of the system would bring better policy outcomes.

In “Presidential Relations with Congress,” Roger H. Davidson examines some of the strategies and tactics that presidents use in attempting to accomplish their policy preferences. He sees the president’s legislative duties as requiring both agenda-setting and bargaining to achieve programmatic goals. This bargaining, he notes, must occur on at least four levels: with party leaders, with Capitol Hill work groups, with rank-and-file lawmakers, and with the public at large. A president’s greatest asset is a hefty partisan majority in Congress; however, he cautions that unified party control of the two branches does not guarantee unquestioning support from the president’s party in Congress, as Barack Obama found out during the first year of his presidency.

In the latter decades of the 20th century and the first years of the 21st, politics in Congress have been particularly divisive, increasingly polarized,

and marked by gridlock. The difficulty that Congress and the president have in addressing important public policy issues has often been attributed to divided government, that is, when one political party controls the House, Senate, or the presidency, but not all three. This sets up a situation in which each of the institutions has an effective veto on public policy that is hard to overcome. Political scientist Sarah Binder examines the consequences of divided government, but discovers that even more important than the division of power between the two parties is the ideological distance between them and the ideological distance between the two houses of Congress. Under such circumstances, policymaking does not grind to a halt, but it becomes more contentious and difficult.

The relationship between the presidency and the courts has always been delicate. Federal judges have been aware that the judiciary has little leverage in enforcing a decision that the executive might decide to resist. The executive has the power of the sword, the legislature has the power of the purse to curb the executive, but the judiciary has only the power of judgment and legitimacy. The power of the Supreme Court extends to the interpretation of the laws and the Constitution, and it has taken up many contentious issues of public policy, some of which have changed the direction of national policy.

Thus the stakes are high when presidents nominate men and women for lifetime positions on the Supreme Court. The article, by John Anthony Maltese, illuminates the dynamics of the separate institutions as they contend over the nomination of Supreme Court justices, with the president having the initiative to nominate but the Senate having the power to confirm or deny the president's choice.

Maltese analyzes the politics of Supreme Court nominations and notes that, although most presidential nominations are confirmed by the Senate, a significant number fail because of political conflict. Conflict over nominations has occurred ever since the Senate's rejection of George Washington's nomination of John Rutledge, and Maltese documents the broader politicization of Court nominations in the 20th century. He concludes that presidents can avoid major political fights by nominating moderate people to the Court; but the polarization of American politics makes this difficult to do, as was evident in the political contention over President Obama's nominations of Justices Sonia Sotomayor and Elena Kagan.

The importance of the separation of powers in U.S. politics was reinforced by the success of the Tea Party movement that sprang up in 2009 in reaction to the deteriorating economic situation resulting from the Great Recession begun in 2008. In the final selection, Zachary Courser analyzes the nature of the Tea Party and its effect on the congressional elections of 2010. The election was a disaster for President Obama and the Democrats, with Republicans gaining 63 seats in the House of Representatives to give them control of the chamber and 6 seats in the Senate, for a total of 47 Senate seats. Courser explains that although the Tea Party was a significant factor in the 2010 elections, it was much more of a grassroots movement than an organized political party. He concludes that its main effect will be on the Republican Party, providing votes and pulling it to the right politically.

SELECTED BIBLIOGRAPHY

- Binder, Sarah, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington: Brookings, 2003).
- Corwin, Edward S., *The President: Office and Powers* (New York: New York University Press, 1957).
- Davidson, Roger H., ed., *The Postreform Congress* (New York: St. Martin's Press, 1992).
- Edwards, George C., *At the Margins* (New Haven, CT: Yale University Press, 1989).
- Fiorina, Morris, *Congress: Keystone of the Washington Establishment* (New Haven, CT: Yale University Press, 1989).
- Fisher, Louis, *Constitutional Conflicts Between Congress and the President* (Lawrence, KS: University Press of Kansas, 1991).
- Jones, Charles O., *The Presidency in a Separated System*, 2nd ed. (Washington, DC: Brookings, 2005).
- Maltese, John Anthony, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1998).
- Matheson, Scott, Jr., *Presidential Constitutionalism in Perilous Times* (Cambridge, MA: Harvard University Press, 2009).
- Mayhew, David R., *Divided We Govern* (New Haven, CT: Yale University Press, 1991).
- Mezey, Michael, *Congress, the President and Public Policy* (Boulder, CO: Westview Press, 1989).
- Peterson, Mark A., *Legislating Together* (Cambridge, MA: Harvard University Press, 1990).
- Pfiffner, James P., *Power Play: The Bush Presidency and the Constitution* (Washington, D.C.: Brookings, 2008).
- Pfiffner, James P., *The President, the Budget, and Congress: Impoundment and the 1974 Budget Act* (Boulder, CO: Westview Press, 1979).
- Shull, Steven A., ed., *The Two Presidencies* (Chicago, IL: Nelson Hall, 1991).
- Spitzer, Robert J., *President and Congress* (New York: McGraw-Hill, 1993).
- Sundquist, James, *The Decline and Resurgence of Congress* (Washington, DC: Brookings, 1981).
- Thurber, James A., ed. *Rivals for Power*, 3rd ed. (Washington, DC: CQ Press, 2005).
- Yalov, David A., *Pursuit of Justices* (University of Chicago Press, 1999).

Reading 25

Presidential Relations with Congress

ROGER H. DAVIDSON

The designer of the Nation's Capital, Major Pierre L'Enfant, followed logic and advice when he placed the president and Congress on opposite sides of the city. Congress would occupy a single large building on Jenkins Hill, the highest promontory. On a plain a mile or so to the northwest would be the executive mansion. A broad avenue was planned to permit ceremonial exchanges of communication; but a bridge linking them by spanning Tiber Creek was not built for some 40 years. Thus, the Capitol faced eastward and the Executive Mansion northward, their backs turned on each other.¹

Linkages between the two elective branches lie at the heart of the policy successes—and failures—of our government. The relationship is sometimes benign but more often conflict-ridden. Although cooperation is required to pass and implement policies, the two branches have different duties and serve divergent constituencies. Constitutional scholar Edward S. Corwin was referring to foreign policy when he described the Constitution as “an invitation to struggle” between the two elected branches, but the phrase applies even more to domestic policies.

THE CONSTITUTIONAL FORMULA

Following history and philosophical principles, the Constitution's writers devoted Article I to the legislative branch. Congress is granted an awesome array of powers, embracing most of the government functions known to eighteenth-century thinkers. Reflecting the founders' Whig heritage of legislative supremacy—not to mention the founders' own legislative experiences—Congress's prerogatives embrace the historic parliamentary power of the purse in addition to sweeping supervision over money and currency, interstate and foreign commerce, and public works and improvement projects. Congress also plays an active part in foreign and defense policies, traditional prerogatives of the Crown. It is charged with declaring war, ratifying treaties, raising and supporting armies and navies, and setting rules governing military forces—including rules governing “captures on land and water” (Article I, Section 8). Finally, Congress is granted an elastic power “to make all laws which shall be necessary and proper” for carrying out its enumerated powers.

In contrast to Article I's precise listing of powers, Article II—the executive article—is quite loosely drawn. (However experienced the Founders were in legislative affairs, they had no clear models for the singular chief executive they envisioned.) In working out both legislative and executive policies, however, the Constitution spreads authority across both elected branches.

Source: Original essay written for this volume.

Even though Congress is vested with “all legislative powers herein granted” (Article I, Section 1), other provisions make it clear that these powers must be shared with the executive. Presidents can convene one or both houses of Congress in special session. Although they cannot personally introduce legislation, presidents “shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as [they] shall judge necessary and expedient.” In other words, presidents can shape the legislative agenda, even if they cannot assure that their proposals will be taken seriously, much less enacted into law. Since Franklin D. Roosevelt in the 1930s, all presidents have taken an active agenda-setting role. Although presidents compile widely varying legislative success records, all of them are now expected to submit their legislative programs and strive to gain their acceptance.

Modern presidents have struggled to dominate executive-branch agencies in the face of Capitol Hill and interest group efforts to capture them. During George W. Bush’s administration, his proponents of presidential power contrived the “unitary executive” doctrine: that presidents ought to have complete control over all the entities within the executive branch. The text and intent of the Constitution, however, lend little support to this theory. Although the president is vested with “the executive power” (Article II, Section 1), the charter never defines that power. Thus, a presidential administration is, in Edward S. Corwin’s careful words, “a more or less integrated body of officials through whom he can act.”²

Presidents also have the power to veto congressional enactments. Once a bill or resolution has passed both houses of Congress and been presented to the president, the president must sign or return it within ten days, excluding Sundays. A two-thirds vote is required in both houses to overrule a president’s veto.

The veto power makes the president a major player in legislative politics. Out of more than 2,500 vetoes from George Washington through George W. Bush, only about 4 percent have been overridden by Congress. (Many vetoed bills eventually resurface in another form, however.) Presidents commonly explain their vetoes in one of the following ways: (1) the measure is deemed unconstitutional; (2) it encroaches on the president’s powers; (3) it is unwise public policy; (4) it cannot be administered effectively; or (5) it either costs too much or does not cost enough (that is, it falls short of what the president requested).

The most powerful vetoes are usually those that are threatened but not employed. Lawmakers constantly look to the White House to ascertain whether or not the president is likely to sign the bill. Therefore, enactments usually embody tradeoffs between provisions desired by the president and those favored by drafters on Capitol Hill. That is the leading reason why vetoes are relatively infrequent: throughout our history, presidents have vetoed only about 3 percent of all the measures presented to them. George W. Bush exercised no vetoes in his first six years in office, but when the opposition Democrats took over Congress in 2007, he began to wield his veto pen.

Throughout his administration, however, Bush issued more than 800 “signing statements” explaining his interpretation of the laws he signed—often controversial and sometimes at odds with the measures’ purposes or even their

plain texts. (Such statements do not have the force of law; but they are printed in the *Federal Register* and are intended to guide executives who implement the laws, not to mention judges who interpret them.) One of the more notorious examples involved Senator John McCain's (R-AZ) anti-torture amendment to the 2006 defense appropriations act. The provision reads:

No individual in the custody or under the control of the United States government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

McCain's amendment, which was widely discussed on Capitol Hill and in the press, passed overwhelmingly in both chambers. The president had agreed to sign it, and he did so.³ However, the White House then put out two signing statements. The first—for public consumption—praised the bill and even referred favorably to the anti-torture provision. Later that evening, a second statement was issued—it was the Friday before the New Year's holiday, when few reporters were on duty—about how interrogators were to interpret the new torture ban law. According to this statement,

The executive branch shall construe [the torture ban] in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the president . . . of protecting the American people from further terrorist attacks.

In other words, the commander in chief would ignore the law if he saw fit to do so. Senator McCain issued a statement taking issue with the White House's interpretation and promising "strict [congressional] oversight to monitor the administration's implementation of the new law."⁴ So the inter-branch conflict was joined.

Although President Barack Obama vowed to depart from the Bush record on signing statements, he issued his own in several instances—sometimes to the dismay of Capitol Hill leaders. The president's minor objections to the 1,132-page 2009 appropriations bill were, he said, "subject to well-founded constitutional objections." A later statement appended to a State Department funding bill held that it might "interfere with [the president's] ability to conduct foreign policy." In response, the House in July 2009 passed a follow-up amendment—by a margin of 429-2—warning the president that if he ignored the provisions, he risked a congressional cut-off of funds. "We do this not just on behalf of this institution, but on behalf of democracy," declared Representative Barney Frank (D-MA). "There's a kind of unilateralism, an undemocratic, unreachable way about these signing statements."

Congress nonetheless shapes the executive branch in many ways. Virtually alone among the world's national assemblies, Congress has the capacity to write, process, and refine its own legislation, relying largely upon its own staffs to augment executive initiatives and outside sources of information. Executive agencies receive their mandates, missions, programs, and even structures

through congressional authorizations (as influenced and signed by presidents, of course). Key executive officers, as well as federal judges, are nominated by the president, but confirmed only “by and with the advice and consent of the Senate” (Article II, Section 2). Through its appropriations bills, Congress can then expand or contract executive agencies’ programs and personnel.

In short, the Constitution blends executive and legislative authority, even though each branch is assigned special duties. The resulting scheme is popularly known as *separation of powers*. However, theory and historical practice point to something rather different: an arrangement of *separate institutions sharing powers*. The relationship was designed, as James Madison explained in *Federalist* No. 48, so that “these departments be so far connected and blended as to give to each a constitutional control over the others.”⁵ Inter-branch relations are the product of compromise and accommodation, not of isolation or precise metes and bounds.

GROWTH OF THE “LEGISLATIVE PRESIDENCY”

History bears out Madison’s practical approach to presidential-congressional relationships. Rigid lines of demarcation between the White House and Capitol Hill have been repeatedly trespassed. Alexander Hamilton, the first Treasury Secretary, aggressively sought mastery over Congress, as did Thomas Jefferson as president a decade later. For its part, Congress lost no time delving into the details of executive-branch operations—a habit that persists to this day and is often denounced as “micro-management” by frustrated executive managers.

Executive-legislative contacts, however, have expanded in volume, intensity, and formal structure. During the nineteenth century, presidents and Congresses tended to work at arm’s length, although strong presidents like Jefferson, Andrew Jackson, and Abraham Lincoln took an active part in legislative business. After Lincoln’s death in 1865 there ensued an era of presidential eclipse that lasted for more than a generation: “Congressional government,” political scientist Woodrow Wilson called it in 1885—long before he himself served in the White House. Still, underlying post-Civil War trends—among them industrial growth, economic and social complexity, and an expanding public sector—laid the groundwork for later presidential activism in the legislative arena.

The modern legislative role of the president is primarily a twentieth-century phenomenon. Wilson and the two Roosevelts—Theodore and Franklin Delano—all sent lengthy legislative agendas up to Capitol Hill. Wilson revived the practice of delivering his State of the Union address in person to capture public attention and media coverage. Since the end of World War II, everyone—Congress, the press, and the public—expects vigorous leadership from the White House. Presidents are judged in the media and elsewhere by their win-and-loss records on Capitol Hill. Presidents who neglect to present and promote their legislative priorities, or who appear simply to defer to congressional initiatives, invite criticism that they are weak or ineffective—a complaint voiced about President Obama’s bargaining with the hostile post-2010 Congress.

Framing agendas is what the presidency is all about. Within the White House, priorities have to be established for using the president's precious commodities of time, energy, and influence. Setting a national policy agenda poses the same problem writ large: how to guide or control the key actors rather than being swept along by other people's initiatives. This is the leadership challenge for all presidents with ambitious program goals—among them Wilson, the two Roosevelts, Lyndon Johnson, Ronald Reagan, and Barack Obama.

Reagan's first year in the White House (1981), for example, was a modern-day model of leadership through strict agenda control. Acting swiftly and communicating skillfully, the new president imposed his priorities at both ends of Pennsylvania Avenue—focusing on economic measures while pushing aside divisive social issues (for example, abortion and school prayer) urged by his conservative allies.⁶ The Reagan program swept through the nation's capital not because it was necessarily the right idea, but because at that moment it was the most compelling idea in town.

Despite his contested victory in 2000, George W. Bush quickly launched a bold set of agenda items—most of them calculated to appeal to the Republican Party's core supporters, mainly economic and cultural conservatives. Like Reagan, Bush kept his legislative agenda narrow and focused. As a result of his active salesmanship and refusal to back down, Bush was able in June 2001 to sign a ten-year \$1.35 trillion tax cut, which became the touchstone of his presidency—the first of several such tax measures. Other victories followed: a major bill federalizing school reform, passed with bipartisan support; and “faith-based initiatives”—channeling federal grants to religious groups—an objective that appealed to religious supporters and achieved primarily through funding bills and revised agency regulations.

After the terrorist attacks of September 11, 2001, a panicky Congress quickly passed a series of bills supported by the administration. Three days after the attacks, lopsided majorities in both houses passed S. J. Res. 23, authorizing the president “to use all necessary and appropriate force” against the perpetrators. (This authorization was later used by the White House to justify actions not envisioned by Congress, including domestic wiretapping without court-approved warrants.) There followed the Patriot Act—an unprecedented domestic anti-terrorism law—intended to strengthen the government's hand in spotting and catching residents suspected of being potential terrorists.

The following fall, as the 2002 congressional elections loomed, the White House pushed two more fateful measures. First, sizable majorities in the House and Senate approved a blanket authorization for the president to intervene militarily in Iraq (H. J. Res. 114), bowing to the White House's argument equating the war on terror with toppling Saddam Hussein's autocratic regime. Some congressional skepticism, however, surfaced in a requirement that the president consult first with allies and the United Nations, and that he certify that peaceful options had failed before taking military action. A second White House priority—a new 180,000-employee Department of Homeland Security (DHS)—was stalled by Democrats' worries over the status of the agency's federal

employees. Campaigning for GOP congressional candidates, Bush was able to berate Democrats for foot-dragging on DHS—which was approved shortly after the elections. Members on both sides of the aisle, however, eventually had reason to regret their haste in giving the executive the sweeping grants of authority that were contained in such bills.

Bush's aggressive agenda was the outcome of his advisors' view that the presidency had been greatly weakened by "unwise compromises" made by past occupants of the Oval Office. "I've seen a constant, steady erosion of the power and the ability of the president to do his job," declared Vice President Dick Cheney, "and time after time, administrations have traded away the authority of the president to do his job. We're not going to do that in this administration."⁷ Cheney's view no doubt underlay the White House's refusal, among other things, to share documents with Congress, permit certain executive officers to testify before congressional committees, or otherwise cooperate with investigative or oversight efforts.

Cheney's view, unfortunately, rested upon a serious misreading of executive-legislative relations. It squared neither with the Framers' design nor with recent historical trends. Despite a short-lived resurgence of congressional initiative in the 1970s—following the Watergate scandal and the Vietnam War—the overall story of contemporary legislative power is one of ebb, not flow.⁸ Louis Fisher's careful study of the historical record concerning war powers, for example, reveals that a combination of presidential hubris and congressional abdication has caused an "unmistakable . . . drift away from Capitol Hill."⁹

Presidents communicate their agendas in a variety of ways—not only in State of the Union addresses, but in special messages, reports, required documents such as annual budgets, and public speeches of all kinds. Through these devices presidents can highlight priorities, provoke public debate, stimulate congressional deliberation, and exhort for attention and support.

PRESIDENTIAL COALITION-BUILDING

If modern presidents have no choice but to undertake legislative leadership, they nonetheless compile widely differing records of success. More than anything else, success or failure hinges on whether the president's party controls the House and Senate, as well as how many votes the parties and their component factions command. Unified party control of the two branches nearly always produces higher levels of agreement than does divided party control. A president's skills or popularity with the public have less impact, although they do enhance or shrink a president's legislative record "at the margins."¹⁰

Recent Congresses find partisans more ideologically divided than at any time in more than a century. Thus party leaders in both chambers enjoy the advantage of leading like-minded partisans who—because of their ideological and policy consensus—are willing to accept their direction on a large number of broad policy questions.¹¹ Political scientists call this "conditional party government"—and "conditional" tends to mean that leaders are expected to follow the strict party line.

Despite the prevalence of quasi-party government, however, we must not forget that members of Congress are still independent players. Most of the time their party loyalty is reflexive, expressed out of deep conviction and political socialization. Legislators' core goals, however, are advancing their constituency and career interests. As long as these goals coincide with the party's priorities, members will follow the party line. But when the two sets of values deviate, members grow restless and balk at their party leaders' demands.

As a result of recent elections, moreover, party government is noticeably weaker—in scholarly parlance, more “conditional”—among Democrats than among Republicans. Historically, even until recent years, the GOP embraced a small but active group of moderate lawmakers—mostly from the Northeast, but scattered elsewhere as well—who were prepared to break party ranks on, for example, social, environmental, and human rights issues. Through retirements or defeats, however, the number of GOP moderates has gradually dwindled. Among the Democrats, the conservative “Blue Dog” members swelled in the early 2000s; but many were replaced by conservative Republicans in the 2010 elections. At the same time, many suburban constituencies—whose constituents combine fiscal caution with social liberalism—have chosen Democrats rather than Republicans to represent them. The current congressional parties thus tend toward ideological rigidity. The White House-congressional compromise on the debt-limit issue in mid-2011, for example, passed but was opposed on both sides of the aisle by minorities who shunned the compromise and blamed their leaders—liberal Democrats blaming Obama and Tea Party Republicans rebuking their leaders for capitulating.

Initially President Obama waved the banner of bipartisanship, making a point of inviting Republicans to the White House and promising to heed their concerns. But GOP solidarity usually thwarted cross-party alliances. A handful of Republicans supported Obama's first financial stimulus packages and his first Supreme Court nominee, Judge Sonia Sotomayor. However, Republicans tended to close ranks on the president's prime legislative objectives—health care and energy reform—and many of his later nominations.

Viewed from the White House, these realities mean that coalitions must repeatedly be forged in order to achieve legislative victories. In persuading and bargaining with Congress, presidents work on at least four levels: with congressional leaders (especially those of the majority party); with the numerous committee, issue, and factional work groups on Capitol Hill; with individual members, sometimes one by one; and with Congress as a whole, through media appeals and grassroots support.

Dealing with Congressional Leaders

Congress is organized by its two major parties, whose leaders supervise the legislative schedule and seek to guide the flow of legislation through the committees and on the floor. Leadership in the larger House of Representatives emerged early in the nation's history; the Speaker is a partisan as well as a parliamentary officer, with potent organizing and scheduling powers.

The Senate's party floor leadership emerged in the Wilson era (1913–1921)—primarily, scholars have concluded, in order to coordinate Senate actions with White House initiatives.

To achieve legislative results, party leaders have been tempted to violate what members and scholars regard as “the regular order”—traditional rules and courtesies needed to preserve comity among parties and factions. Thus House leaders are able to preempt committee deliberations, craft new versions of bills, and arrange floor debate and amendments so as to assure favorable outcomes. In contested House floor votes, the balloting period is sometimes stretched beyond the normal 15 minutes, so that members' arms can be twisted. During House consideration of the conference report on the 2003 Medicare prescription drug bill—a prize item in President George W. Bush's reelection strategy—House GOP leaders kept the balloting open for nearly three hours (a modern record). Finally, the leaders squeezed out a 220–215 victory, after three members from each party switched their votes to “yes.” Bitter complaints about the leaders' tactics were heard from both sides of the aisle. After promising to work cooperatively on legislation, Democrats in the 110th and 111th Congresses (2007–2011) sometimes used the rules to prevent the opposition from offering alternative measures—prompting Republican complaints that nothing had changed. In the 112th Congress (2011–2013), however, the tables were turned as GOP leaders spoke for the House.

In the Senate, cross-party harmony is more common. But over the last decade, committee and floor votes are often as partisan as those in the House. And minority-party senators—Democrats (1995–2006) and then Republicans (2007–)—resort to delaying tactics—including frequent threats of filibusters, which under chamber rules require 60 votes to quell. The result is often stalemate—sometimes to the anger of the House's majority-party leaders, who can more easily produce floor victories for their bills.

The White House often seeks out individual leaders who command special subject-matter expertise or bargaining skills. Such a leader was Senator Edward M. Kennedy (D-MA), whose 47-year career made him one of the giants of the modern Senate. Although a liberal (a frequent target of negative GOP ads), he was regarded on both sides of the aisle as an “honest broker”: someone adept at finding compromises and reliable in keeping his word. During the Obama administration's first year, Kennedy's losing battle with brain cancer kept him away from the Hill and the Senate's Health, Education, Labor, and Pensions (HELP) Committee, which he chaired. His absence was felt acutely during delicate negotiations over multiple House and Senate committee bills on health care reform, a signature Kennedy issue. A GOP colleague, Iowa's Senator Charles E. Grassley, confessed that “[i]f Kennedy were here, it would make melding the Finance Committee bill and the HELP Committee bill that much easier.”¹²

Presidents meet frequently with House and Senate leaders from both parties. However, enlisting the leaders' support is only one purpose of such meetings. Party leaders bring reports and warnings about the likely fate of presidential initiatives. They take back equally valuable hints about the president's plans and intentions

that can be turned into the coin of influence in dealing with their colleagues. Relationships are obviously more cordial when Congress is led by the president's party—for example, the Republican majorities of George W. Bush's first six years and Democrats in Obama's first two years. Barack Obama's election in 2008 briefly restored single-party control, with the president relying on mostly sympathetic leaders. The 2010 elections, however, gave Republicans control of the House and quasi-control in the Senate (putting the 60 votes needed to close debate beyond the normal reach of Democratic leaders). However, formal meetings—whether friendly or not—are only the tip of the iceberg. White House staff members and congressional leaders' staffs are in daily—sometimes even hourly—contact on a wide range of legislative matters.

What do presidents get out of their contacts with congressional leaders? At best they gain loyalty and support. More commonly, they glean timely intelligence about Congress's mood as well as advice about where to look in seeking votes. Messages from the Hill are not always what the president wants to hear. For example, it was through candid sessions with key Republicans, especially then-Senate Majority Leader Bill Frist (R-TN), that the Bush White House learned in October 2005 that the Supreme Court nomination of presidential counsel Harriet Miers was doomed—primarily because of opposition within GOP ranks.

Capitol Hill Work Groups

Bargaining with a few influential leaders no longer ensures passage of the president's program. The specific provisions of bills are normally hammered out in congressional committees or subcommittees. Today's Congress embraces a large number of work groups—including committees, subcommittees, party entities, task forces, and informal caucuses. In the 112th Congress (2011–2013), there were some 200 standing (that is, more or less permanent) work groups—House and Senate committees and their subcommittees, along with four joint committees.

The jurisdictional boundaries among these entities are complex, often overlapping, and sometimes the object of competitive bidding. Today 11 House committees deal with aspects of environmental policy; the Senate has an Environment and Public Works Committee, but at least nine other panels share jurisdiction over related topics. The Department of Homeland Security, created in 2002, faces a jurisdictional jungle on Capitol Hill. Claiming that at least 88 committees and subcommittees had some jurisdiction over DHS, the independent 9/11 Commission urged each chamber to create a single authorizing committee for the agency.¹³ The House decided to do so, but the Senate demurred; its lead authorizing committee was Governmental Affairs—whose former chair, Senator Susan Collins (R-ME), complained that the panel controlled only 38 percent of the DHS budget and 8 percent of its personnel.

To untangle committee jurisdictional barriers posed by President Obama's wide-ranging agenda, House Democratic chairs managed to coordinate their

efforts. To straddle health care reform, three committees worked to put together an omnibus bill: Energy and Commerce, Education and Labor, and Ways and Means. The climate change bill—American Clean Energy and Security Act or (ACES)—was referred to Representative Henry Waxman's Committee on Energy and Commerce and no less than eight other panels (all of which were eventually discharged from considering the measure). In the end, Waxman and Agriculture Chair Collin C. Peterson of Minnesota struck a deal embodied in a substitute bill pushed through the Rules Committee and reported to the floor. Six hours later, the rule was called up and the bill passed by the narrow margin of 219–212. Former Rules staff director Don Wolfensberger pronounced the result “an impressive display of a well-oiled and energy-efficient political machine that maximized majority strengths while avoiding minority resistance by process of exclusion.”¹⁴

Party task forces and informal voting-bloc groups outside the standing committee system allow members to involve themselves in policies of interest to them. Before 1970 there were only a handful of informal caucuses; today there are more than a hundred.

Persuading Individual Lawmakers

Despite the prevalence of party-line behavior, senators and representatives are basically autonomous. Of course they are not free of outside influences. Partisan influences are surprisingly strong: party-line voting on Capitol Hill has soared to modern-day highs in recent years, and party leaders wield sanctions to discourage those who too often stray from the fold. But constituents put their own concerns first and expect their representatives to defend those interests, even if it means straying from the party line. Indeed, given the multiplicity of interested citizens and groups, as well as their unprecedented invasion into electoral politics, “special interests” probably are more powerful and certainly more pervasive than they have ever been. As a result, members march to many different drummers—first one, then another. An evocative metaphor was used by former Senator John Breaux (D-LA), who as a representative joined other southerners to support President Reagan's 1981 budget package in exchange for reconsideration of sugar price supports—which the administration had opposed as inflationary. Asked if his vote could be bought, Breaux replied: “No, but it can be rented.”¹⁵

Sooner or later, presidents and their aides must “retail” their appeals, engaging individual members of Congress in order to sell the White House position, ask for votes, and offer inducements for support. Presidents have always had to make these personal, informal overtures. Washington dispatched Treasury Secretary Hamilton to consult with members; Jefferson socialized at the White House with congressional allies. With their stress on legislative achievements, modern presidents have assigned White House staffers to conduct day-to-day relations with Capitol Hill. Franklin Roosevelt and Harry Truman dispatched close aides to contact members and help build support for legislation. Dwight Eisenhower set up the first separate congressional liaison

office. His legislative goals were modest, and the style of his liaison staff was low-key and mainly bipartisan.¹⁶

In 1961, President Kennedy expanded legislative liaison (renamed the Office of Congressional Relations) to advance his New Frontier legislative program. Its head, Lawrence F. O'Brien, regarded as the father of modern legislative liaison, dispatched staff aides to Capitol Hill to familiarize themselves with members from each geographical area, learn their interests, and plan how to win their votes for the president's program. Departmental and agency liaison activities were coordinated to complement White House efforts.

Presidents since Kennedy have added their individual touches, but all have continued the liaison apparatus. Nixon elevated his first liaison chief, Bryce Harlow, to cabinet status; Ford enlarged the staff; Carter added computers to analyze congressional votes and target members for persuasion. In other respects, Carter's liaison operation drew less than rave reviews. While the inexperience of Carter's initial liaison people contributed to the appearance of ineptitude, Carter's own indifference to Congress probably was more to blame. When a president gives only sporadic attention to one of his duties, staff productivity is bound to suffer.

Effective congressional liaison involves granting or withholding resources in order to cultivate support on Capitol Hill. This includes not only patronage—executive and judicial posts—but also construction projects, government installations, offers of campaign support, access to strategic information, plane rides on Air Force One, White House dinners and social events, signed photographs, and countless other favors both large and small that can be traded for needed votes. Some of these services may seem petty or even tawdry; but legislative majorities are oftentimes built out of a patchwork of such appeals.

Some presidents relish the persuasive challenges of their office. Lyndon Johnson was known for "the treatment," a face-to-face assault that ranged the whole gamut of human emotions and often left its targets emotionally battered. Ronald Reagan was known for dispensing gift cuff links and theater tickets along with brief homilies, prompted by index cards, concerning the issue at hand. Both George Bushes engaged in a variety of informal contacts, ranging from White House social events to mobile phone conversations. A few presidents, like Richard Nixon and Jimmy Carter, disliked asking for votes and preferred to leave the task to others.

Clinton employed a variety of tactics in desperate efforts to win approval of his chief legislative proposals. In several instances he named an individual to serve as "lobbying czar" for a particular issue; White House aides worked feverishly out of a Capitol Hill "war room" to coordinate their lobbying efforts. Clinton's 1993 budget—which raised taxes on fuels and for upper-income individuals, cut the defense budget, and hiked funds for some social and antipoverty programs—was perhaps his greatest victory. Campaigning intensely and in person, Clinton and his allies managed to overcome defections from conservative Democrats. The plan barely passed the House (218 to 216) and the Senate (51 to 50, with Vice President Al Gore casting the tie-breaking vote). It was an important achievement: by raising taxes, especially in the

higher-income brackets, the measure helped produce large budget surpluses by the late 1990s.

A legislative high point of Clinton's first term—congressional approval of NAFTA in late 1993—was the result of a bipartisan effort. Many Democrats, among them leaders of organized labor and such House figures as the House Democratic Whip, opposed the treaty. Clinton launched a high-profile public relations campaign, trumpeted the treaty's job-creation benefits, welcomed support from Republican leaders, and cut deals to meet individual legislators' objections. The legislation implementing NAFTA was a huge patchwork of provisions aimed at placating disparate interests. It included a program to retrain U.S. workers who lost their jobs because of competition from low-wage foreign firms. In the end, only 40 percent of House Democrats supported the president, but along with those of 132 Republicans, their 102 votes were enough to gain House approval. NAFTA then easily passed the Senate.

The NAFTA victory contained a valuable lesson in winning votes on Capitol Hill. The president's partisan allies can't always be counted on for support, so opposition party lawmakers should never be written off in searching for votes. This maxim is even more important when supermajorities are required for passage—as in the 60 votes needed to end a Senate filibuster. As one reporter explained it, the White House

had learned from the budget negotiations, in which each concession had led to demands for another, that it needed to be firm. And yet it couldn't be too combative, because it needed to attract two more Republican votes to break the filibuster.¹⁷

As a minority president working first with a fractious Capitol Hill majority (1993–1994) and then with a minority that was by turns disheartened (1995–1996), resurgent (1997), defensive (1998), and again emboldened (1999–2000), Clinton and his aides were obliged to forage for votes wherever they could find them. Threatening to veto congressional measures sometimes is needed to get members of Congress to see things the president's way. Over his first two years Clinton was able to keep his veto pen in his pocket, becoming the first president since Millard Fillmore in the 1850s to not veto a single bill during an entire Congress (George W. Bush became the second).

Facing an aggressive GOP majority after 1994, Clinton actively played the veto card as a last-resort bargaining device. His tough bargaining goaded the Republicans into calling his bluff and shutting down the government on two occasions during the winter of 1995–1996—an impasse, which the public blamed mainly on the GOP Congress. Resolving not to let this happen again, Republican leaders thereafter dealt more cautiously with the White House on spending bills. Anxious to end the divisive and unproductive 105th Congress in October 1998, GOP strategists opted to settle any funding disputes.

George W. Bush, whose presidency rested on a contested election and who then faced Capitol Hill parties that were in virtual parity, had no choice but to build winning coalitions one at a time as congressional votes took place. As his legislative program was seemingly unraveling in mid-2001, he risked

defeat on a popular “patients’ rights” bill—setting federal rules in support of patients in suits against their health maintenance organizations (HMOs). The House was poised to enlarge patients’ right to sue their HMOs beyond what Bush’s corporate backers could support; yet Bush could not afford to veto such a popular measure. So the White House reached out to Representative Charlie Norwood (R-GA), a former dentist who had staked his career on this issue, even bucking his party leaders by cosponsoring a bipartisan HMO bill with, among others, senior Democrat John D. Dingell (MI).

When the two met in the Oval Office, President Bush opened with several minutes of lavish praise for Norwood’s skill in outmaneuvering the administration. “So now that I’ve kissed your [rear end], what do I have to do to get a deal?” Bush asked.¹⁸ They explored the two unresolved issues, and a deal was cut; the entire meeting lasted no more than 15 minutes. “Norwood told Bush he wanted to take the deal back to the Hill and discuss it with allies. ‘The President wasn’t going to let him off the property without going by the press first,’ a Bush aide said.” Norwood’s allies from both parties were dismayed or angry at his decision to freelance behind their backs. “The deal had to be cut by somebody,” Norwood said in defending his decision to go to the president and say, “What do we need to do to get your signature?”

The Bush-Norwood agreement was a textbook legislative bargain: a key legislator compromised in order to assure that the president would not veto the measure, and the president modified his demands to assure passage of the bill. “Norwood gives you the Good Housekeeping seal of approval,” remarked an aide to then-Speaker J. Dennis Hastert (R-IL). “He will bring along a lot of undecided House members.”¹⁹ Norwood’s reputation as a champion of the issue gave many moderate Republicans “political cover” to support the president and their party leaders. The crucial amendment—setting forth patients’ rights in damage suits against HMOs—was adopted 218 to 213, with only six Republicans breaking ranks.

Mobilizing Public Pressure

In their efforts to goad members of Congress into agreement, presidents strive to mobilize public opinion.²⁰ White House staffs devote much time to gaining media attention and stimulating popular support. Presidents are better than Congress at exploiting the media, so they assume that media coverage will enhance their influence. The hope is that a “fireside chat,” a nationally televised address, a carefully planned event, or a nationwide tour might be able to tap a vast reservoir of support “outside the beltway” that members of Congress dare not defy.

“Going public” on behalf of an issue is not without its risks. If the president already enjoys overall support on Capitol Hill, such extreme tactics are redundant. The president may raise expectations that cannot be fulfilled, make inept appeals, lose control over the issue, alienate legislators whose support is needed, or put forward hastily conceived proposals. Public persuasion can be a potent tactic, but overuse will dull its impact. Finally, although presidents enjoy unique access to media and public attention, they are not the only political actors striving to sell their positions or programs. Many members of Congress

attempt to bend public debate in their direction by staking out an issue or voicing a viewpoint in such a way that it attracts attention. Lobbying groups with deep pockets can mount media campaigns that mobilize not only their own members but the general public as well.

The collapse of the Clinton administration's 1994 health care reform initiative showed the limits of public appeals. President Clinton had trouble keeping the public spotlight on his message, especially after months were consumed in drafting the White House's bulky proposal. That delay gave skeptical lawmakers and threatened lobbying groups time to ferret out the plan's weaknesses and raise public doubts. Moreover, health-care providers and insurers, who comprise one of the nation's largest and wealthiest industries, outspent and outgunned the White House in reaching the public. A consortium of large insurance firms, the Health Insurance Association of America (HIAA), launched a simple but effective series of ads and media spots featuring "Harry and Louise," an average couple who voiced their worries over the complicated Clinton plan.

George W. Bush had mixed success in making public appeals. His moderately successful tenure was invigorated by the terrorists' attacks of September 11, 2001—when he assumed leadership by declaring a "war on terror" and thereafter launched attacks on Afghanistan, a known terrorist base of operations. But a prolonged second war, against Saddam Hussein's regime in Iraq, eventually faced mounting opposition—as had occurred in the wars in Korea (early 1950s) and Vietnam (late 1960s). Repeated speeches and events—that had initially evoked patriotic responses—eventually fell on indifferent ears. A major Bush domestic priority—reforming Social Security by privatizing individuals' accounts—utterly failed to catch fire despite scores of presidential speeches, statements, and staged meetings with citizens.

At the outset of his presidency, Barack Obama enjoyed personal public support hovering around 60 percent. And although citizens expressed misgivings about his specific policy initiatives, they still wanted him to press for action on such major issues as the economy, health care, and the deficit.²¹

The Obama White House sponsored appearances, speeches, and public forums highlighting the president's wide-ranging agenda. Organizing for America, a Democratic grassroots group that grew out of the Obama campaign apparatus, launched a television ad campaign that recast the "Harry and Louise" ads that in 1994 had helped scuttle the Clinton health care reforms. This time around, Harry and Louise favored Obama's effort to enact a universal health care plan. The TV spots targeted states represented by centrist Democrats as well as some Republicans.²²

Affected industry groups—of which there are dozens in the money-rich health care field—challenged the president and aired their own viewpoints. The U.S. Chamber of Commerce, the nation's leading business lobby, launched a campaign against what it called "government-run health care." The chamber's Campaign for Responsible Health Reform ran print and online ads and flooded lawmakers' offices with letters and phone calls. Meanwhile, a more targeted campaign came from a biotechnology and pharmaceutical industry group called BIO—many of the same firms that had fought the Clinton

health plan—that lobbied to give drug manufacturers longer periods of exclusive patent rights (“exclusivity”) for their products and delay their release as lower-cost generic compounds. (The opposing coalition, composed of seniors, consumer groups, pharmacy benefit managers, and health insurers, hoped to bring down drug costs through shorter “exclusivity” periods for manufacturers.)²³ Such conflicts—waged by multiple groups with deep pockets—were a central challenge during the Obama presidency.

Cultivating public favor and support continues to figure prominently in White House efforts to prevail in legislative-executive struggles. Newly elected presidents are told to act quickly in order to capitalize on their early support and enact their agendas.

Modern presidents, no matter how popular, face the prospect that their initial “honeymoon period”—when public hopes and approval run high—can quickly fade. Popularity usually slips as the administration remains in office, repeatedly making decisions that alienate one group after another. For some presidents, such as Eisenhower and Reagan, the decline was minimal; for others—among them Truman, Johnson, Nixon, Ford, Carter, and Bush (father and son)—the decline was precipitous. Clinton’s honeymoon hardly survived the wedding night. The second Bush endured a lackluster first nine months, but after 9/11 soared on the updraft of a prolonged public “rally” effect, which added luster to a number of his legislative initiatives; only in his second term did that support dissipate. Obama reen countered a similar decline when his numerous initiatives confronted problems of cost and support.

PATTERNS OF INTER-BRANCH CONTROL

Of all the factors that affect inter-branch relations, partisan control is the most powerful. Both branches may be controlled by the same single party—*party government*, as this situation is commonly termed. *Divided government* occurs when Congress and the White House are in the hands of opposing parties—as happened over the final two years of George W. Bush’s presidency. A third pattern, *truncated majority*, leaves the president’s party controlling one but not both houses of Congress. Historically this pattern has been rather rare. But for six years of Reagan’s presidency—1981–1987—Republicans claimed the Senate but not the House. And after less than six months in office, George W. Bush saw the Senate shift from Republican to Democratic control until the 2002 elections restored full party control. After the 2010 midterm elections, Obama faced *de facto* divided government: The GOP controlled the House with a sizable majority; Senate Democrats—whose 53 members gave them nominal control—were stymied by the need to gather 60 votes to avoid constant GOP filibuster threats.

Party Government

For much of our history, the same party has tended to control the White House and both chambers of Congress. This was the case during about two thirds of all the congresses throughout the twentieth century. But this orderly state of

affairs became less common than it once was: One-party control marked only 13 of the 34 Congresses (38 percent) between 1945 and 2013. During much of this period, tensions between White House and Capitol Hill were high.

Eras of true legislative harmony—party government in the parliamentary sense of the term—are relatively rare in this country. There have been only four over the last century: Woodrow Wilson's first administration (1913–1917); Franklin Roosevelt's celebrated “New Deal” (1933–1936); the balmyest days of Lyndon Johnson's “Great Society” (1963–1966); and George W. Bush's first term (2001–2005). These flowed from unique convergences of a forceful chief executive, a popular but unfulfilled policy agenda, and a Congress responsive to presidential leadership. For good or ill, these were periods of active lawmaking that produced landmark legislation and innovative governmental programs.

Periods of party government as productive as these four are not free of problems, of course. Lawmaking can be so fast-paced and sweeping that political institutions may require years to absorb the new programs and their costs. Succeeding generations may reconsider, retrench, or even reverse over-ambitious or ineffective programs.

Nor does partisan control of the two branches guarantee legislative success. Although Congress boasted Democratic majorities during all but four years from the late 1930s until the mid-1960s, its affairs actually were dominated by a conservative coalition of southern Democrats and Republicans. The coalition's ascendancy over domestic policy outlasted several presidents of varying goals and skills. It succeeded in thwarting civil rights and social legislation pushed by Roosevelt, Harry S. Truman, and later Kennedy. The later case of Jimmy Carter is more complicated, but despite huge Democratic majorities in both chambers his legislative record was mixed. George W. Bush's legislative majorities were more modest. His first four years in office were quite successful; but his second, lame-duck term found his fellow Republicans splintered over the course of public policies. The Obama administration's record with a Democratic majority (2009–2011) was successful; but the Republicans who captured the House and almost the Senate (2011–2013) vowed to make him a one-term president.

Divided Government

Divided government has been more common in modern times. It marked all of Nixon's, Ford's, Reagan's, and George H. W. Bush's presidencies, all but two years of Eisenhower's, Clinton's, and George W. Bush's, and two years of Truman's and Obama's. Under divided government, inter-branch relationships range from lukewarm to hostile. During the Eisenhower administration, Democratic Congresses tended to refrain from attacking the popular president, developing instead modest legislative alternatives and pushing them during election years. Hostility marked relations between Truman and the Republican Congress of 1947–1948, which he labeled the “awful 80th Congress” during his barnstorming 1948 reelection campaign. The same hostility

marked relations between Nixon and Democratic Congresses (1969–1974), between Clinton and Republican ones (1995–2001), between George W. Bush and the Democratic 110th Congress (2007–2009), and between Obama and the congressional GOP (2011–2013).

The most recent periods of divided control underscore the frustration and stalemate that can result. Believing that their successes in the 2006 elections flowed from public weariness over the Iraq war, Democratic leaders sought to stress their policy disagreements with a series of measures aimed at setting timetables for withdrawing troops and other conditions for continued funding. All were thwarted by presidential vetoes or the failure to curb GOP filibusters in the Senate. The Democrats' achievements were few but significant: a new ethics package, a long-overdue hike in the minimum wage, and a significant energy bill. But Congress's public image continued to sag: only 18 percent of the respondents in a NBC News/*Wall Street Journal* poll in January 2008 approved of Congress's performance.²⁴

Even if Congress does not prevail in situations of divided control, it has weapons that can embarrass the administration and stall its initiatives. One weapon is *legislative oversight*—the ability to hold public hearings and issue reports concerning alleged mismanagement of federal programs. Assessing the new Democratic Congress in 2007, Thomas E. Mann and his colleagues observed that “[A]fter years of inattention, congressional oversight of the executive has intensified, most sharply regarding the war in Iraq.”²⁵ Domestically, charges that partisan politics governed the removal of several U.S. attorneys, for example, damaged George W. Bush's administration and led to the resignation of several key Justice Department officials, including Attorney General Alberto Gonzales.

Another weapon is withholding action on presidential nominations. During Bush's final two years and Obama's post-2010 years, Senate committees declined to act upon dozens of appointees, especially federal judgeships. Senators' hopes for a partisan shift in the White House—Democrats looking toward the 2008 elections, and Republicans hoping for Obama's defeat in 2012—were mostly to blame. “The process has just completely broken down,” noted Paul C. Light, a leading scholar.²⁶ Although two Supreme Court nominees were confirmed early in Obama's tenure, dozens of lower-court and executive nominees were ignored, to the detriment of government functions.

Another high-wire tactic marked the Obama presidency after the 2010 elections emboldened Republicans on Capitol Hill: holding hostage congressional decisions subject to deadlines. The first occurred in the lame-duck session (November–December 2010). Eager to preserve Bush-era tax cuts (set to expire on December 31), Republican leaders bargained over deadlines for the economic recession programs Obama wished to extend. So the Bush tax cuts were extended for another two years (to 2013) while jobless benefits and a Social Security payroll tax cut were also extended.

Even more egregious was the debt-limit compromise in mid-2011. Raising the federal debt limit was regarded as a routine congressional responsibility.²⁷ Propelled by Tea Party anger over federal spending, however, many Republicans threatened to vote against raising the debt limit. Rather than

risk the nation's "full faith and credit," Obama again chose to negotiate with party leaders, agreeing to a series of spending cuts in exchange for raising the debt limit. The deal was approved by both houses, although a number of hard-liners in each party voted "No"—fiscally-conservative Republicans who held that supporting any further debt was immoral, and liberal Democrats who claimed that Obama was an inept bargainer who should have insisted on higher taxes and spending to fight the recession and create jobs. The result was insubstantial. As former Representative Lee H. Hamilton (D-IN) remarked, "Democrats and Republicans offered proposals that avoided the details of cutting budgets or increasing revenues. . . . Politicians love to find creative ways to avoid resolving difficult policy questions."²⁸

Divided government does not preclude inter-branch cooperation or legislative productivity. Despite divided party control, legislative activity was extraordinarily high during the Nixon and Ford presidencies and during Reagan's first year. Some scholars contend that the supposed benefits of unified party control have been exaggerated. David R. Mayhew found that unified or divided control made little difference in enactment of important legislation or launching of high-profile congressional investigations of executive-branch misdeeds. His follow-up study of the Clinton and George W. Bush presidencies seemed to confirm this conclusion: "On the lean evidence," he writes, "unified party control was not a superior supplier of legislative volume."²⁹ My own examination of legislative productivity levels also revealed that they corresponded imperfectly with presidential administrations, whether with united or divided party control.³⁰

Yet divided government exacts a long-term price in terms of policy stalemate. Uncommon leadership and skillful inter-branch bargaining are required to overcome divergent political stakes and resultant inertia. Frustration in achieving their policy goals psychologically wears down presidents, legislators, and their staffs. Policy decisions may be deferred or compromised so severely that the solutions have little impact. Voters find it difficult to hold presidents and lawmakers accountable, as each blames the other for failing to resolve pressing national problems or enact coherent policies.

Assessing Presidential Influence

Shifts of influence between the White House and Capitol Hill are a recurrent feature of American politics. Scholars are tempted to designate certain eras as times of "congressional government" and others of "presidential dominance." There is surely an ebb and flow of power between the two branches, but one must be cautious in generalizing about them.

Passage of presidential initiatives is a starting point. Indeed, the rate at which such measures are passed is a common index of presidential success. But influence over legislation is difficult to measure with certainty. Who really initiates legislation? A president can draw publicity by articulating a proposal and giving it currency, but its real origins are likely to be embedded in years of political agitation, congressional hearings, or academic discussion.

What exactly is “the president’s program”? Major proposals are adopted and trumpeted by the president; but what of minor proposals? Franklin Roosevelt’s New Deal successes of the 1930s are regarded as a high-water mark of presidential leadership; but aside from emergency measures approved quickly during his first hundred days, his legislative agenda drew heavily on proposals already introduced and incubated on Capitol Hill. Lyndon Johnson liked to announce support for measures already assured of passage in order to boost his record of success. Bill Clinton’s first year (1993) boasted the most successful post-Johnson legislative record; but a number of the enactments were long-standing Democratic party agenda items stalled by White House vetoes during the Reagan-Bush years—for example, the Family and Medical Leave Act, the “Motor Voter” registration plan, and the Brady handgun control bill.³¹ A number of George W. Bush’s most publicized achievements—for example, creation of the 9/11 Commission and the Department of Homeland Security, as well as reforming the government’s intelligence network—were initiated on Capitol Hill; some were at first stoutly resisted by the White House. In other words, not all White House-endorsed measures really “belong” to the president; not all weigh equally in the president’s agenda.

Finally, who actually wields the decisive influence in enacting a piece of legislation? Presidential lobbying may tip the scales, but no legislation passes Congress without help from many quarters. Lawrence H. Chamberlain’s pioneering study of ninety laws (1873–1940) found that presidential influence predominated in only about a fifth of the cases; more than half of those occurred during the New Deal years of the 1930s.³² Congressional influence dominated in almost 40 percent of the laws, and joint presidential-congressional influence in about a third. In a few cases, mainly tariff laws, interest groups were the dominant force. Chamberlain’s findings demonstrate “the joint character of the American legislative process.”³³

The seemingly inexorable growth of the presidency in the modern era has done little to alter these findings. From their examination of twelve categories of laws (1940–1967), Ronald C. Moe and Steven C. Teel concluded that “Congress continues to be an active innovator and very much in the legislative business.”³⁴ More recent investigations have yielded identical conclusions.³⁵ Because lawmaking is such a cooperative enterprise in our system, White House influence over legislation should not be exaggerated.

The legislative-executive balance of power is in constant flux. The influence of either branch can be affected by issues, circumstances, or personalities. Exhibit A was Clinton’s roller-coaster ride with Congress and the American people—which produced several distinct phases of executive-legislative relations. Exhibit B was his successor’s regime, which passed through at least three phases: a moderately productive pre-9/11 period, an extremely successful post-9/11 period, and a conflict-laden second term. Obama’s pre- and post-2010 presidencies were very different. Even within a single administration, then, the pendulum of power can swing back and forth.

Nor are legislative-executive struggles necessarily zero-sum games. If one branch gains power, it does not necessarily mean that the other loses it. Even

when one branch is eclipsed, it may exert potent influence. When Clinton's agenda-setting role atrophied, for example, his veto and rule-making powers could still be deployed skillfully and cunningly. Bush, his successor, declared war on terrorists and then linked the war to a discretionary invasion of Iraq; in the process Congress ceded much of its constitutional authority over military matters. When the public tired of the Iraqi venture and its side effects, however, Congress began to insist upon its right to set conditions and even timetables for ending the conflict.

Expanded governmental authority since World War II has augmented the authority of both branches. Yet believers in representative democracy now confront troubling times. "The default position between presidents and Congress has moved toward the presidential end of the inter-branch spectrum—and irreversibly so," is Andrew Rudalevige's bleak judgment. "Presidents have regained freedom of unilateral action in a variety of areas, from executive privilege to war powers to covert operations to campaign spending."³⁶ Congress's prerogatives are under siege not only from aggressive executive officials but also from activist federal judges and elite opinion makers—who repeatedly belittle its capacities and evade its scrutiny.

Yet lawmakers themselves are to blame for yielding all too often to the initiatives of executives (and others)—for failing to ask hard questions and to demand straight answers. Congress all too often retreats from its constitutional stature as an initiator of national policy and an overseer of government operations. It has ceded too much ground to executives, bureaucrats, courts, and even private entities. As a result Congress has fallen distressingly—but hopefully not irreversibly—short of the Founders' vision that it should be the "first branch of government."

ENDNOTES

1. James Sterling Young, *The Washington Community, 1800–1828* (New York: Columbia University Press, 1966), pp. 75–76.
2. Edward S. Corwin, *The President: Office and Powers, 1787–1957* (New York: New York University Press, 1957), p. 69.
3. Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown & Co, 2007), pp. 224–227. Savage, a national legal reporter for the *Boston Globe*, won a 2007 Pulitzer Prize for his exposure of White House signing statements.
4. Savage, "Three GOP Senators Blast Bush Bid to Bypass Torture Ban," *Boston Globe*, (January 5, 2006).
5. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed., (New York: Mentor, 1961), p. 308.
6. White House advisors apparently understood these inconsistencies from the start. See David Stockman, *The Triumph of Politics* (New York: Harper & Row, 1986).
7. Susan Page, "GAO Chief, Cheney Barreling toward Showdown," *USA Today* (February 18, 2002), p. 6A.
8. On the pre-modern history of inter-branch relations, see James L. Sundquist's masterful survey, *The Decline and Resurgence of Congress* (Washington, DC: The Brookings Institution, 1981).
9. Louis Fisher, *Presidential War Power*, 2nd rev. ed. (Lawrence: University Press of Kansas, 2004), p. 261.

10. George C. Edwards, *At the Margins* (New Haven: Yale University Press, 1989).
11. John H. Aldrich, *Why Parties? The Origin and Transformation of Party Politics in America* (Chicago: University of Chicago Press, 1995); Aldrich and David W. Rohde, "The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government," in Jon R. Bond and Richard Fleisher, eds, *Polarized Politics: Congress and the President in a Partisan Era* (Washington, DC: CQ Press, 2000), pp. 31–72.
12. Mark Liebovich, "Absent Voice on Health Bill Is Resonating," *New York Times* (July 17, 2009), p. A.
13. National Commission on Terrorist Attacks upon the United States, *The 9/11 Report* (New York: St. Martin's Paperbacks, 2004), pp. 596–599.
14. Don Wolfensberger, "Climate Change Bill Wins on Political Energy Boost," *Roll Call*, (July 7, 2009), p. 6.
15. Quoted in *Congressional Quarterly Weekly Report* 39 (July 4, 1981): 1169.
16. Stephen J. Wayne, *The Legislative Presidency* (New York: Harper & Row, 1978), p. 142.
17. Steven Waldman, *The Bill* (New York: Viking Books, 1995), p. 213.
18. Dana Milbank and Juliet Eilperin, "On Patients' Rights Deal, Bush Scored with a Full-Court Press," *Washington Post* (August 3, 2001) p. A9.
19. Robert Pear, "Bush Strikes Deal on a Bill Defining Rights of Patients," *New York Times* (August 2, 2001), p. A16.
20. Samuel Kernell, *Going Public: New Strategies of Presidential Leadership*, 3rd ed. (Washington, DC: CQ Press, 1997).
21. Dan Balz and Jon Cohen, "Poll Shows Obama Slipping on Key Issues," *Washington Post* (July 20, 2009), p. A1.
22. Christi Parsons and Noam N. Levey, "Obama Takes Health Care Debate and Runs with It," *Los Angeles Times* (July 21, 2009), p. A1; Christi Parsons, "Amid Criticism, Obama Kicks Health Care Drive Up a Gear," *Los Angeles Times* (July 22, 2009), p. A18.
23. Kate Ackley, "An Ad Blitz That Really Worked?" *Roll Call* (July 15, 2009), p. 9.
24. "Current Opinion," *Roll Call* (January 31, 2008), p. 4.
25. Thomas E. Mann, Molly Reynolds, and Peter Hoey, "Is Congress on the Mend?" *New York Times* (April 28, 2007), p. A27.
26. Quoted in James Gerstenganz, "Prospects Are Dim for Bush Nominees," *Los Angeles Times* (February 7, 2008), p. A12.
27. Stephen J. Wayne, *The Legislative Presidency* (New York: Harper & Row, 1978), p. 142.
28. Lee H. Hamilton, "Congress Doesn't Like Making Hard Choices," Center on Congress, Indiana University (August 16, 2011), p. 1.
29. David R. Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigations, 1946–2002*, 2nd ed. (New Haven: Yale University Press, 2005), p. 215.
30. Roger H. Davidson, "The Presidency and Congressional Time," in James A. Thurber, ed., *Rivals for Power: Cooperation and Conflict between the President and Congress*, 2nd ed. (Lanham, MD: Rowman & Littlefield, 2006), pp. 125–149.
31. Phil Duncan and Steve Langdon, "When Congress Had to Choose, It Voted to Back Clinton," *Congressional Quarterly Weekly Report* (December 18, 1992), pp. 3427–3431.
32. Lawrence H. Chamberlain, *The President, Congress and Legislation* (New York: Columbia University Press, 1946), pp. 460–462.
33. Chamberlain, p. 453.
34. Ronald C. Moe and Steven C. Teel, "Congress as Policy-Maker: A Necessary Reappraisal," *Political Science Quarterly* 85 (September 1970): 469.
35. Mark A. Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan* (Cambridge: Harvard University Press, 1990); Mayhew, *Divided We Govern*.
36. Andrew Rudalevige, *The New Imperial Presidency* (Ann Arbor: University of Michigan Press, 2005), p. 261.

Reading 26

The Disappearing Political Center

SARAH A. BINDER

Thus far, one of the big stories of [recent] congressional elections is not who is running, but who is quitting. Most notably, these retirements are speeding along the thinning of the political center—the “incredible shrinking middle,” as one senator calls it.

Within the Republican party, the moderate wing occupies the political center—that is, it is closer ideologically to the midpoint between the two parties than to its own party’s ideological center. And retirements threaten to eliminate Republican moderates from Capitol Hill. . . . Among Democrats the party’s conservative wing is closest to the political center. And it too is being depleted.

The result, many worry, is an unprecedented disappearance of the political center. In a political system that demands compromise and accommodation to bring about change, the center is considered vital to the moderate, bipartisan public policymaking generally preferred by the American public. Absent a political center, increased partisanship and ideological polarization are inevitable—and sure to feed public distrust of and distaste for politicians and the political process.

WHITHER THE CENTER?

The political center in Congress has shrunk markedly over the past 15 years (Figure 26.1). Hovering around 30 percent of House and Senate members in the 1960s and 1970s, the percentage of centrists in each chamber began slipping in the 1980s, and it has fallen to about 10 percent today. Centrists now can claim 11.3 percent of the House, down from 20 percent or more during the 1980s. And after peaking at 32.3 percent of the Senate during 1969–70, the first term of the Nixon administration, centrists make up less than 10 percent of today’s Senate.

The broadly similar declines in both chambers conceal several notable differences between the House and Senate and their two parties. In the House, both conservative Democrats and moderate Republicans have seen their ranks gradually thin since the early 1970s. But the conservative Democratic faction has consistently been larger than the moderate wing of the Republican conference since the late 1950s. Today conservative Democrats in the House still outnumber moderate Republicans three to one.

Source: Reprinted from *The Brookings Review* 15 (Fall 1996): pp. 36–39. Used by permission of the Brookings Institution.

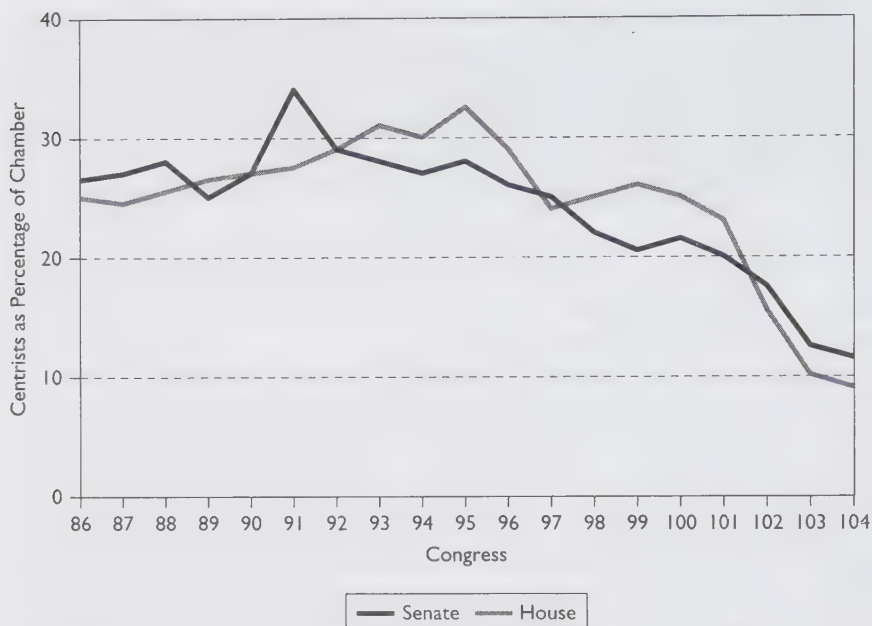


FIGURE 26.1

Size of the Political Center, 1959–96

Note: "Centrists" are defined as those members or senators whose ideological positions on a liberal conservative dimension place them closer to the ideological mid-point between the two parties than in the median member of their own party. Ideological scores are drawn from first dimension coordinates of D NOMINATE and W NOMINATE scores calculated by Keith Poole and Howard Rosenthal from congressional roll call data. NOMINATE scores for the 104th Congress (1995–96) are based on the roll call votes through December 1995. See Keith T. Poole and Howard Rosenthal, "Patterns of Congressional Voting," *American Journal of Political Science*, February 1991.

In the Senate, centrists of both parties actually increased sporadically from the mid-1960s to the mid-1970s before starting to decline during the late 1970s. However, the most striking development in the Senate has been the depletion of conservative Democrats, whose numbers made up nearly a quarter of Senate Democrats during the late 1980s but in recent years claim only a handful.

ARE RETIREMENTS TO BLAME?

The conventional wisdom is that voluntary retirements are newly driving the demise of the middle as House and Senate centrists find themselves too out of step with their parties to seek reelection.

As it turns out, the retirement of conservative Democrats in the House is nothing new. Conservative Democrats consistently made up the lion's share of their party's House retirements in every election save two between 1968 and

1978. But though conservative Democrats retired at very high rates during the 1970s, their contingent shrank only incrementally, suggesting that retiring conservative Democrats tended to be replaced by like-minded lawmakers. What is new is that Democratic conservatives who are once again showing an increased tendency to retire—particularly in the 1994 election and in the upcoming fall elections—are no longer being replaced by their own kind. Southern voters instead are electing conservative Republicans. The overall size of the Democrats' right-leaning wing is steadily shrinking.

Out of step with their more liberal colleagues, often unable to swallow the policy prescriptions of the new Republican majority, and facing voters who now prefer conservative Republicans to themselves, House Democratic conservatives (save those who jumped ship and switched to the Republican party) have little incentive to stay in the House. Observed retiring Pete Peterson (D-FL), "I have worked as a bridge-builder to find bipartisan solutions to our nation's problems. Unfortunately, the current political climate has rendered this approach ineffective."

Unlike their Democratic colleagues, moderate House Republicans have shown little distinctive inclination to retire, either now or in the past. . . . The steady decline of moderate Republicans since the early 1970s suggest that electoral defeat and replacement by more conservative Republicans, not retirement, has been at work. Although moderate Republicans make up less than 10 percent of the House Republican conference, they are not showing their discouragement by retiring. . . . The Republicans' slim majority in the House clearly enhances the leverage of their small moderate wing. In times past, recalled moderate Sherwood Boehlert (R-NY) early this year, Republican moderates got "more attention and consideration from the Democratic majority side than they did from the leadership of the Republican majority. That has changed."

In the Senate, most retirements among centrists are by Republicans, not Democrats. In fact the thinning of conservative Democratic ranks does not appear to have been driven by voluntary retirements. . . . The abrupt drop in the number of conservative Senate Democrats in recent years appears to be, again, more the result of the emergency of a conservative Republican electorate in the South than of voluntary retirements. To be sure, over time these two forces are likely to complement each other: As conservative Democrats are replaced by Republicans or in some cases by liberal Democrats, the more isolated their remaining political soul mates likely feel and the more likely they are to retire.

Among Senate Republicans, the retirement of moderates has only lately begun taking its toll on the dwindling center. The gradual rightward shift of Senate Republicans in the past, it seems, has primarily been driven by election results, not voluntary retirements. This year is an important exception, as Republican moderates are calling it quits before testing the electoral waters. Seeing their numbers shrunk by electoral forces in recent years and finding themselves increasingly isolated by their more conservative and homogeneous Republican colleagues, moderate Republicans are strongly inclined to give

up their Senate seats. Democratic Senator John Breaux of Louisiana described their predicament best: “. . . Those in the middle, [he] noted, have to have someone to meet with. You can’t meet with yourself in a phone booth.”

A CONGRESS WITHOUT A POLITICAL CENTER

The shrinking political center has left Congress increasingly polarized (Figure 26.2). Democrats are perched on the left, Republicans on the right, in both the House and the Senate as the ideological centers of the two parties have moved markedly apart. The change since the late 1980s is most extreme for the Senate, but striking for both chambers. From the late 1950s until well into the 1980s, the ideological distance between the centers of the two parties became more homogeneous. Since the 1980s, the distance between the two parties has essentially doubled.

Some observers might see the parties’ movement toward ideological extremes as a benign, if not positive, development. Advocates of stronger political parties, for example, have bemoaned a political system that encourages the two major parties to drift toward the center. A disappearing center reflects to some extent the emergence of more cohesive and homogeneous

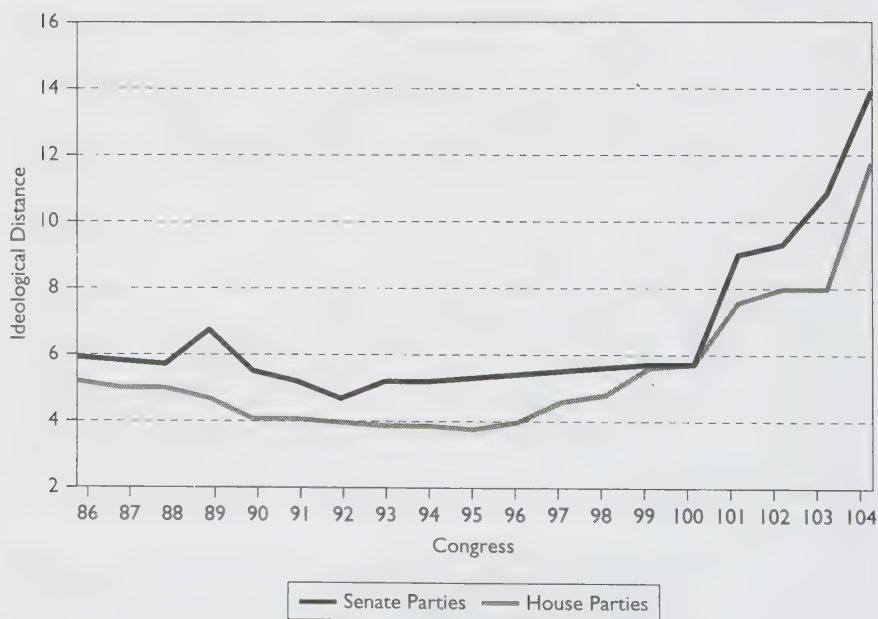


FIGURE 26.2

Ideological Distance between Congressional Parties, 1959–96

Note: Ideological distance is the absolute difference between the median Democrat and the median Republican in each chamber, based on Poole and Rosenthal’s NOMINATE scores (see notes to Figure 26.1).

legislative parties. And as the distance between the two parties grows, their philosophical differences on such matters as the appropriate role and reach of the federal government become more pronounced, giving voters a real choice between political agendas.

But the movement away from the center has been accompanied by a coarsening of politics and bitter partisanship—leaving voters increasingly disenchanted with Washington politics. Political discord has played itself out in part in an apparent decline in congressional comity. Senator Robert Byrd noted scathingly last year, “There have been giants in this Senate, and I have seen some of them. Little did I know when I came here that I would live to see pygmies.”

The polarized environment has also made it hard for members of both parties to meet in the center to forge compromise. As former majority leader Bob Dole lamented in retiring from the Senate, “None of us has a perfect solution. But there’s got to be some solution of where we can come together, Republicans and Democrats.” The farther apart the two parties, the tougher it is to negotiate compromise, partly because fewer members are positioned in the center and partly because there is little incentive for others to reach into the middle. In the Senate, for example, Republicans this year adopted a new party rule that requires party leaders and committee chairs (who now must be confirmed by secret ballot) to pledge allegiance to a legislative agenda at the start of each Congress. Reaching across party lines is unlikely to be rewarded in such a partisan climate—something Senator John Chafee discovered after trying unsuccessfully to negotiate a bipartisan solution to the health care debate in 1994. In the House, several moderate Republicans were passed over for committee chairmanships when their party captured the majority in 1994. Carlos Moorhead, a conservative Republican from California with a reputation for conciliation, was in line to chair both the Commerce Committee and the Judiciary Committee and failed to get either—because, his chief aide contended, Speaker Newt Gingrich had let it be known that Moorhead was “just not mean enough.”

Increased polarization may have the most profound effects in the Senate. Unlike the House, where simple partisan majorities can prevail over minority opposition, bipartisan agreement is all but essential in the Senate. Unless the majority in the Senate has a filibuster-proof roster of 60 senators consistently willing to cut off debate, it will continually be stymied by minority opposition. Much of the legislation that grew out of the House Republican Contract with America in 1995 languished and died in the Senate despite the support of the majority—a fate that illustrates well the effects of ideologically distant parties in the Senate.

Of course, the ideological centers of the two parties are not fixed in stone. In fact, as the congressional elections approach, many voters seem apprehensive about the excesses of the Republican majority, and congressional Democrats seem determined to moderate their platform and image. It may be that voters will nudge the two parties back to the center—giving the political center a reprieve from its predicted demise.

Reading 27

Presidents and the Judicial Appointment Process

JOHN ANTHONY MALTESE

As Barack Obama's nominations of Sonia Sotomayor and Elena Kagan reminded us, Supreme Court justices are among the most important (and contentious) nominations that presidents send to the Senate. As a tool for influencing judicial policymaking, Supreme Court appointments are an important exercise of presidential power. They are also a test of presidential strength, since the Senate retains the constitutional power to offer "advice and consent" (and thus confirm or reject) nominees.

The Senate, controlled by Democrats, eventually confirmed both Sotomayor and Kagan: Sotomayor in August 2009 by a vote of 68 to 31, and Kagan in August 2010 by a vote of 63 to 37. George W. Bush's nominees also provoked controversy and garnered a substantial number of negative votes (Samuel A. Alito, Jr. was confirmed by a vote of 58 to 42, and John G. Roberts, Jr. was confirmed by a vote of 78 to 22). In stark contrast, the earlier nominations of Antonin Scalia and John Paul Stevens (both of whom would surely provoke controversy if they had to face the confirmation process today) sailed through the Senate by a vote of 98 to 0.

Such lopsided votes were common until Ronald Reagan's controversial nomination of Robert Bork in 1987. Bork was nominated to replace a "swing" voter on the nine-member Court who broke the tie between two blocks of four justices. Bork's predecessor leaned toward the more liberal block of four justices; Bork did not. Therefore he was a potentially "transformative" appointment: one that could have led to the reversal of a number of closely decided liberal-leaning 5-4 decisions including the 1973 abortion rights decision, *Roe v. Wade*, 410 U.S. 113. Interest groups mobilized with fury and the Senate rejected Bork by a vote of 58 to 42, not because he was unqualified but simply because of how he would vote if he got on the Court. Many justices had been defeated before Bork, but never so openly because of how they would vote if confirmed. The fact that the Senate now considered it legitimate to judge confirmation on such a basis transformed the process and led to the close votes of many recent nominees.

More recently, Harriet Miers (nominated by George W. Bush in 2005) withdrew her nomination before the Senate could even hold hearings on her. Like Bork in 1987, Miers was nominated to replace a "swing" voter on the Court, thereby making her a potentially "transformative" appointment who could move the Court to the right. President Bush's conservative base had waited years for this opportunity. They were stunned when Bush failed to

nominate a tried and true conservative and instead turned to the unknown Miers—a longtime friend.

William Kristol, a leading conservative, wrote that the Miers nomination left him “disappointed, depressed, and demoralized.” “It is very hard to avoid the conclusion that President Bush flinched from a fight on constitutional philosophy,” Kristol wrote, adding that the nomination appeared to reflect “a combination of cronyism and capitulation on the part of the president.” “Surely,” he concluded, “this is a pick from weakness.”¹ George Will went even further, arguing that Miers was unqualified for a post on the Supreme Court. “It is not important that she be confirmed,” he wrote, “because there is no evidence that she is among the leading lights of American jurisprudence, or that she possesses talents commensurate with the Supreme Court’s tasks. The president’s ‘argument’ for her amounts to: Trust me. There is no reason to. . . .”²

In the coming days, the White House did nothing to improve Miers’ standing. President Bush, in a clumsy attempt to win over conservatives, pointed to her religious faith as a justification for her nomination.³ Meanwhile, former Indiana Senator Dan Coats, who led the White House effort to shepherd the Miers nomination through the Senate, made an embarrassing attempt to turn charges of Miers’ mediocrity into a virtue: “If a great intellectual powerhouse is a requirement to be a member of the court and represent the American people and the wishes of the American people and to interpret the Constitution, then I think we have a court so skewed on the intellectual side that we may not be getting representation of America as a whole.”⁴ In the end, both the Republican and Democratic leaders of the Senate Judiciary Committee publicly rebuked Miers for her “incomplete” and “inadequate” answers to a detailed questionnaire from the committee.⁵ A week later, she withdrew and Bush nominated a tried and true conservative: Samuel Alito.

Miers and Bork are just the latest in a long list of failed Supreme Court nominations. If one excludes consecutive nominations of the same individual by the same president for the same seat on the Supreme Court,⁶ there have been 152 nominations to the Supreme Court submitted to the Senate through President Obama’s 2010 nomination of Kagan. Of these 152 nominations, seven of the nominees declined,⁷ one died before taking office,⁸ and one expected vacancy failed to materialize.⁹ Yet another (Bush’s nomination of John Roberts to fill Sandra Day O’Connor’s associate justice seat) was withdrawn before Senate action and then re-submitted to fill a different seat. Of the 142 remaining nominations, 116 were confirmed by the Senate. The other 26 may be classified as “failed” nominations because Senate opposition blocked them: the Senate rejected twelve by roll-call vote,¹⁰ voted to postpone or table another five,¹¹ and passively rejected five others by taking no action.¹² Presidents withdrew the remaining four in the face of strong opposition.¹³ The number of “failed” nominations rises to 27 if Douglas Ginsburg (whose nomination was announced by Ronald Reagan, but withdrawn before it was officially transmitted to the Senate) is included.¹⁴

The failure rate of Supreme Court nominees is the highest for any appointive post requiring Senate confirmation.¹⁵ That is indicative of the profound effect

that Supreme Court appointments can have on public policy. By defining privacy rights, interpreting the First Amendment, setting guidelines for the treatment of criminal defendants, and exercising its power of judicial review in a host of other areas, the Supreme Court establishes public policy. So do the more than 800 judges who serve on lower federal courts (and who are also nominated by the president and subject to the “advice and consent” of the Senate).

In theory, impartial judges objectively applying the law according to set standards of interpretation should all reach the same “correct” outcome in cases that come before them. But, in practice, there are very different views among judges about how to interpret legal texts. Moreover, judges are human beings who are influenced, at least in part, by their backgrounds, personal predilections, and judicial philosophies. Quite simply, different judges can—and do—reach different conclusions when confronted with the same case. Thus, participants in the federal judicial appointment process often use it as a way to influence policy outcomes.

In a 1969 memo to President Richard Nixon, White House aide Tom Charles Huston noted that judicial nominations were “perhaps the least considered aspect of Presidential power. . . . *In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made.* That is, the role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to [guide them].” Thus, Huston urged Nixon to set specific criteria for the types of judges to be nominated in an effort to influence judicial policymaking. If the president “establishes *his* criteria and establishes *his* machinery for insuring that the criteria are met, the appointments will be *his*, in fact, as in theory.”¹⁶ In response, Nixon wrote: “RN agrees. Have this analysis in mind when making judicial nominations.”¹⁷

Despite Nixon’s approval, it was not until Ronald Reagan that presidents created formal institutional mechanisms for screening federal judicial nominees to ensure that they reflected the administration’s ideology. Reagan created the President’s Committee on Federal Judicial Selection, staffed by representatives of the White House and the Justice Department, to conduct the screening. Political scientist Sheldon Goldman called the innovation “the most systematic judicial philosophical screening of candidates ever seen in the nation’s history.”¹⁸ Critics deemed the screening an ideological litmus test, and members of his administration did not seem to disagree. White House counsel Fred Fielding said the system was designed to choose “people of a certain judicial philosophy,” and Attorney General Edwin Meese III said that it was a way to “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future elections.”¹⁹ And so, faced with judicial nominees chosen by Republicans because of their conservative ideology, Democrats in the Senate began to exert their power to withhold consent based on ideology. That is what led to the 1987 defeat of Robert Bork.

The Bork nomination was unprecedented in the history of Supreme Court confirmation politics in terms of the breadth of involvement by

organized interests, the degree of grassroots support that these groups generated, the extensive use of marketing techniques in the confirmation struggle, the length and detail of Bork's public testimony before the Senate Judiciary Committee, and the number of witnesses appearing at the televised hearings. The process even generated a new verb: to *bork*, which means unleashing a lobbying and public relations campaign designed to defeat a nominee.

Bork's defeat was the culmination of a series of factors that came together to create an epic battle. His was certainly not the first contentious confirmation battle.²⁰ His was not even the first nomination to be "borked" (George Washington's nomination of John Rutledge in 1795 arguably has that distinction),²¹ nor was he the first nominee to face active interest group opposition (groups had actively opposed nominees at least as early as the nomination of Stanley Matthews in 1881,²² and had been largely responsible for defeating several nominees before Bork, including John J. Parker in 1930 and Clement Haynsworth in 1969).²³ Still, as similar as some early confirmation battles were to Bork's in various ways, there was an important difference: throughout the nineteenth century, Senate consideration of Supreme Court nominees had usually taken place behind closed doors. In 1881, the *New York Times* reported that the "Judiciary Committee of the Senate is the most mysterious committee in that body, and succeeds better than any other in maintaining secrecy as to its proceedings."²⁴ Even floor debate on nominees was usually held in executive session. Under Senate rules, floor debate on all nominations remained closed unless two-thirds of the Senate voted to open it—a rare occurrence. In addition, the Senate usually acted quickly on nominations, with both committee action and floor debate often taking place with little discussion and no roll-call votes. This meant that external actors, such as interest groups, seldom had either the time or the opportunity to influence the Senate confirmation process. Secrecy, and the fact that senators were not popularly elected but chosen by state legislatures, meant that retaliation against senators after the fact was also difficult: interest groups might not even know how senators voted and, when they did, the method of choosing senators undermined the potent threat of electoral retaliation that interest groups now possess.

Both of these impediments to interest group involvement were removed in the twentieth century. The ratification of the Seventeenth Amendment to the Constitution in 1913 led to the direct election senators, and Senate rules changes in 1929 opened floor debate on nominations on a regular basis. In turn, the Senate Judiciary Committee opened its hearings to the public. By the time Bork was nominated, the hearings were routinely televised. All this gave interest groups more power. Not only did they now have access to information, they could generate free publicity for their position by sending representatives to testify at the televised hearings. And, by the 1980s, the number of interest groups had increased dramatically, their rhetoric concerning nominees had intensified, and what had once been sporadic involvement in the Supreme Court appointment process was now routine.

Modern presidents reacted to changes in the confirmation process by developing their own strategic resources to help secure confirmation of their

nominees. Presidents now have an unprecedented—though not always successful—ability to communicate directly with the American people, to mobilize interest groups, and to lobby the Senate. For each of these areas, specialized White House staff units have evolved to advise presidents and to implement strategic initiatives. The modern institutional presidency is a system of government centered in the White House, a system in which presidents and their staff oversee the formulation and implementation of policy. Increasingly contentious confirmation battles have made presidents even more reliant on centralized resources to mobilize public opinion, generate group support, and lobby senators to combat opponents of their judicial nominees. Still, there are examples of the failure of such resources. Many suggested, for example, that initial attempts by the Bush administration to sell its nomination of Harriet Miers in 2005 were botched, and the resources at Reagan's disposal in 1987 did not save the Bork nomination.

Another significant change that affected the Bork battle was the emergence of nominee testimony. Until 1925, no Supreme Court nominee had ever testified. Most refused any public comment whatsoever. (Likewise, most presidents at that time refused publicly to discuss their nominees.) It is only since 1955 that every Supreme Court nominee has testified.²⁵ The Supreme Court's landmark school desegregation ruling in *Brown v. Board Education*, 347 U.S. 483 (1954), served as a catalyst for that change. After *Brown*, many southern Democrats insisted on questioning nominees about their judicial philosophy—part of an effort to denounce what they saw as the Court's activism in that case. Such questioning set a precedent for liberals to question Bork about his judicial philosophy.

The trend toward divided government, with one party controlling the White House and another controlling the Senate, also played an important role in the Bork defeat (when a Republican controlled the White House and Democrats controlled the Senate). Divided government was rare before World War II, but has been commonplace since 1969. From 1969 through 2011, the same party controlled the White House and the Senate for only 19 out of 43 years, and the same party controlled the White House and both houses of Congress for only 12 of those 43. When the opposition party controls the Senate, the rejection rate of judicial nominees increases considerably.²⁶ At the Supreme Court level, the statistics are striking: close to 90 percent approval of nominees during unified government, but only about 55 percent approval when the White House and the Senate are controlled by rival parties. Arguably, divided government encourages both the president and Congress to have a stake in each other's failure.

Along with the recent trend of divided government has come a pronounced increase in partisanship. Parties in Congress have become more polarized, with a dramatic increase in partisan voting. Since the mid-1990s, the Senate, as measured by party votes, is even more partisan than the House of Representatives.²⁷ At the same time, partisanship is up among the electorate: party loyalty has increased, ticket splitting has decreased, and the ideological gap between members of the two parties has widened.²⁸

Polarized politics has contributed to the on-going “confirmation mess,” and has led to a dramatic partisan wedge, illustrated by the gap in public support for President Obama between Democrats and Republicans. The Gallup Poll found that 88 percent of Democrats approved of Obama’s performance during his first year in office, compared with only 23 percent of Republicans. The resulting 65 percentage-point gap was the widest for any first year president since polling began (Bill Clinton held the previous record: 52; George W. Bush’s first year gap was 45).²⁹ Obama’s partisan gap increased to 68 points in his second year in office (81 percent approval from Democrats, but only 13 percent approval from Republicans).³⁰

Along with polarized politics came a reluctance to give presidents clear mandates. Neither George W. Bush in 2000 nor Bill Clinton in either 1992 or 1996 received 50 percent of the popular vote. Though he claimed a mandate in 2004, Bush still only received 50.7 percent of the popular vote and 53.3 percent of the electoral vote (even Ronald Reagan’s “landslide” in 1980 amounted to only 50.7 percent of the popular vote—the same as Bush in 2004—although Reagan garnered 90.9 percent of the electoral vote). Initial approval ratings of presidents are down, too. Dwight Eisenhower and Lyndon Johnson both entered office with 78 percent approval ratings according to the Gallup Poll. Even John F. Kennedy, who won only 49.7 percent of the popular vote in 1960, had an initial approval rating of 72 percent. In contrast, Barack Obama was the first president since Jimmy Carter to have had an initial approval rating of more than 58 percent (George W. Bush had 57 percent approval) and, at 25 percent, the highest *disapproval* rating since Gallup polling began; Obama entered office with a 68 percent Gallup approval rating, but that dwindled to 56 percent by July 2009 and to 44 percent by July 2010 before rebounding slightly to 47 percent by July 2011.³¹

This potent combination of interest group involvement, divided government, polarized politics, and lack of electoral mandates has given rise to modern confirmation battles. Those battles have spilled over into lower federal court appointments as well. Both opposition Republicans during Bill Clinton’s presidency and opposition Democrats during the George W. Bush presidency used a variety of tactics to block confirmation of nominees to the lower federal courts.³² The practice began in earnest after Clinton’s 1996 re-election.

When Clinton first ran for president in 1992, he decried what he perceived to be the ideologically driven judicial appointments of Ronald Reagan and George H. W. Bush. Such ideologically narrow appointments, he wrote in 1992, “have resulted in the emergence of a judiciary that is less reflective of our diverse society than at any other time in recent memory. I strongly believe that the judiciary thus runs the risk of losing its legitimacy in the eyes of many Americans.” In comparison, Clinton promised nominees who would be met by the Senate with “general approval.” This, he added, should help to avoid confirmation delays.³³ Although he did promise to nominate judges with “a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy,”³⁴ he nonetheless started out his administration with an apparently genuine effort to present consensus

nominees to the Senate. At the Supreme Court level, Clinton won the support of Sen. Orrin Hatch of Utah, the ranking Republican member of the Senate Judiciary Committee, before nominating Ruth Bader Ginsburg to the Supreme Court in 1993.³⁵ Ginsburg had steered a centrist course as a judge on the U.S. Court of Appeals for the District of Columbia. She won easy confirmation as a Supreme Court justice, as did Stephen Breyer the next year. Again, Clinton sought a consensus nominee and won support from key Republicans, such as Hatch and Sen. Strom Thurmond (R-S.C.).³⁶ Ironically, some liberals seemed more critical of Breyer than conservatives.

Clinton also worked closely with home-state senators, including Republicans, when nominating lower federal judges.³⁷ When the 2002 midterm election ushered in divided government, Clinton reportedly “evinced greater willingness to compromise,” took pains to avoid forwarding controversial nominees to the Senate, and worked closely with the new Republican chairman of the Senate Judiciary Committee, Orrin Hatch of Utah.³⁸ But consensus did not continue in Clinton’s second term. Republicans had made “activist liberal judges” a campaign issue in 1996. Republican presidential nominee Bob Dole called Clinton’s appointees a “team of liberal leniency.” Pat Buchanan, who had sought the Republican nomination had gone even further, lashing out at “judicial dictatorship” and accusing liberal federal judges of protecting “criminals, atheists, homosexuals, flag burners, illegal aliens (including terrorists), convicts, and pornographers.”³⁹ Once re-elected, the conservative Judicial Selection Monitoring Project criticized Republicans for voting to confirm Clinton’s nominees, whom they labeled extreme “judicial activists.” In a fundraising letter, Robert Bork said that Clinton’s nominees were “drawn almost exclusively from the ranks of the liberal elite” and that they had “blazed an activist trail, creating an out-of-control judiciary.”⁴⁰ House Majority Whip Tom DeLay (R-TX) also entered the fray, saying that Republicans should begin efforts to impeach liberal federal judges.⁴¹

The rhetoric emboldened Republicans to launch an unprecedented slowdown of the confirmation of Clinton nominees. Orrin Hatch interpreted Senate practice to allow Republican home-state senators to block hearings on nominees put forward by a Democratic president. By the end of 1997, one in ten seats on the federal judiciary was vacant, with 26 of those seats vacant for at least 18 months. President Clinton declared a “vacancy crisis”⁴²—a view that Chief Justice William Rehnquist reiterated in his 1997 year-end report to Congress on the federal judiciary, saying that continued delay threatened the nation’s “quality of justice.”⁴³

Republicans backed off the slowdown in 1998, but revived it in 1999 as the prospect of a Republican victory in the 2000 presidential election loomed. Just ten years after Reagan left office, Clinton was on the verge of appointing a new majority on the federal courts. Republicans wanted to prevent that. Once again, Judiciary Committee chairman Hatch allowed Republican home-state senators to block Clinton’s judicial nominees. When Clinton left office in January 2001, 42 of his judicial nominees remained unconfirmed. Thirty-eight of them had never received a hearing. In Clinton’s eight years in office, the

Senate had blocked 114 of his lower court nominations and confirmed 366. In comparison, the Senate blocked none of Richard Nixon's lower court nominations and confirmed 224 (it did block two of his Supreme Court nominees). Even during the Reagan administration, the Senate blocked only 43 court nominees and confirmed 368.⁴⁴

After the 2000 presidential election, when Republicans briefly controlled the Senate, Senate Judiciary Committee chair Orrin Hatch announced a dramatic re-interpretation of Senate procedure. Although he had allowed Senate Republicans to block hearings on nominees when Clinton had been president, he now said that Senate Democrats could not block hearings with Bush as president. The turnabout was blatantly political, and Senate Democrats reacted with fury. All fifty signed a letter of protest.⁴⁵ Hatch's plan was temporarily averted when Sen. James Jeffords of Vermont left the Republican party and became an independent, thereby throwing control of the Senate back to the Democrats. But when Republicans regained control after the 2002 midterm elections, Hatch imposed his re-interpretation of Senate procedure. That, in turn, prompted Democrats to use the filibuster against nominees who, under the old rules, would have been blocked by the opposition of a home-state senator. Although Republicans had mounted a filibuster against Lyndon Johnson's nomination of Abe Fortas to be chief justice of the Supreme Court in 1968, Senate Majority Leader Bill Frist of Tennessee now threatened to use of the so-called "nuclear option"—a procedural change designed to end the ability of Senators to use filibusters against judicial nominees. At the eleventh hour, fourteen moderate senators (seven from each party) brokered a compromise that at least temporarily averted the "nuclear option." When the Senate reverted to control by the Democrats in 2007, Republicans again complained that confirmations proceeded too slowly.

Delay tactics continued when President Obama took office. During his first two years in office, the number of judicial vacancies rose from 55 to 97, while the number of "judicial emergencies"⁴⁶ rose from 20 to 46. Like previous administrations controlled by both political parties, Obama's complained of a vacancy "crisis" while those involved pointed fingers at others for causing it.⁴⁷

Political expediency explains much of the behavior of participants in the federal judicial appointment process. At different times both liberals and conservatives have supported strict scrutiny of judicial nominees and decried judicial activism. The conservatives' rallying cry against judicial activism in the early twenty-first century is exactly the same rallying cry used by liberals in the 1920s and '30s to decry the judicial activism of conservative judges who read economic rights into the constitution. Democrats supported the borking of nominees when Reagan was president, but urged a kinder, gentler treatment of nominees when Clinton was in office. Republican embraced the confirmation slowdown of judicial nominees when Clinton was president, but condemned it when Bush became president. Conservatives declared that every nominee had a right to an "up or down vote" when Bush nominated John Roberts in 2005, but applauded the withdrawal of Harriet Miers just a few weeks later. Republicans decried the use of a filibuster when they controlled

the Senate, but resorted to one in May 2011 to block Obama's nomination of Goodwin Liu to fill a seat on the Ninth Circuit Court of Appeals.⁴⁸

At root, the judicial appointment process is a political one: shaped by changing political dynamics and balances of power. As long as the balance of power remains closely divided, the process promises to be a contentious one.

ENDNOTES

1. William Kristol, "Disappointed, Depressed, Demoralized: A Reaction to the Harriet Miers Nomination," *The Daily Standard* (October 4, 2005), online edition.
2. George Will, Editorial, *Chicago Sun-Times* (October 6, 2005), p. 45.
3. Charlie Savage, "Bush, Promoting Miers, Invokes Her Faith," *Boston Globe* (October 13, 2005), p. A1.
4. Quoted in: "A Case of Foot-in-Mouth," *Hartford (Connecticut) Courant* (October 14, 2005), p. A12.
5. Kathy Kiely, "Senators Criticize Miers for 'Inadequate' Answers," *USA Today* (October 20, 2005), p. 4A.
6. The official U.S. Senate website lists eight consecutive re-submissions of nominations of the same person by the same president for the same seat (usually for merely technical reasons): William Patterson in 1793, Edward King in 1844, John Spencer in 1844 (though the re-nomination was withdrawn the same day that it was submitted), Reuben Walworth twice in 1844, William Hornblower in 1893, Pierce Butler in 1922, and John Harlan in 1955. Stanley Matthews, who was consecutively nominated by two different presidents in 1881, is counted twice for our purposes. A complete list of all nominations (including the eight re-nominations by the same president) can be found at the U.S. Senate website: <http://www.senate.gov/pagelayout/reference/nominations/Nominations.shtml>. The 152 nominations do not include Douglas Ginsburg in 1987. Although Ronald Reagan publicly announced Ginsburg's nomination, Ginsburg withdrew before his name was formally submitted to the Senate.
7. Robert Harrison in 1789, William Cushing in 1796, John Jay in 1800, Levi Lincoln in 1811, John Quincy Adams in 1811, William Smith in 1837, and Roscoe Conkling in 1882.
8. Edwin Stanton in 1869.
9. Homer Thornberry was nominated by Lyndon Johnson to fill Abe Fortas' associate justice seat in 1968 when Johnson nominated Fortas to be chief justice. Johnson subsequently withdrew Fortas' nomination. Since Fortas then remained an associate justice, the Senate took no action on Thornberry's nomination.
10. John Rutledge in 1795 (10–14), Alexander Wolcott in 1811 (9–24), John Spencer in 1844 (21–26), George Woodward in 1845 (20–29), Jeremiah Black in 1861 (25–26), Ebenezer Hoar in 1869 (24–33), William Hornblower in 1893 (24–30), Wheeler Peckham in 1894 (32–41), John J. Parker in 1930 (39–41), Clement Haynsworth, Jr. in 1969 (45–55), G. Harrold Carswell in 1970 (45–51), and Robert Bork in 1987 (42–58).
11. John Crittendon in 1828, Roger Taney in 1835, Reuben Walworth and Edward King in 1844, and George Badger in 1853.
12. John Read in 1845, Edward Bradford in 1852, William Micou in 1853, Henry Stanbery in 1866, and Stanley Matthews in 1881.
13. George H. Williams in 1873, Caleb Cushing in 1874, Abe Fortas in 1968, and Harriet Miers in 2005.
14. It rises still further if one counts the unsuccessful re-nominations of individuals already blocked by the Senate: John Spencer (after his Senate rejection), Edward King (after his nomination was blocked by postponement), and Reuben Walworth (twice re-nominated: first after a Senate vote to postpone, and then again after no action being taken by the Senate).
15. P. S. Ruckman, Jr., "The Supreme Court, Critical Nominations, and the Senate Confirmation Process," *55 Journal of Politics* (August 1993), p. 794.
16. Tom Charles Huston to President Richard Nixon, March 25, 1969, pp. 1 and 2, in WHCF ExFG 50, the Judicial Branch (1969–1970), Box 1, White House Central Files, FG 50, Nixon Presidential Materials Project, College Park, Maryland [hereafter "NPMP"].

17. John D. Ehrlichman to Staff Secretary, March 27, 1969, in News Summaries, March 1969, Box 30, President's Office Files, NPMP.
18. Sheldon Goldman, "Reagan's Judicial Legacy: Completing the Puzzle and Summing Up," 72 *Judicature* (April–May 1989), pp. 319–20.
19. Quotes found in David M. O'Brien, *Judicial Roulette* (New York: Priority Press, 1988), pp. 61–62 and 21–24.
20. Between 1835 and 1885, fifteen Supreme Court nominees were rejected by the Senate—a number unmatched in any 50-year period since then.
21. See John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), pp. 26–31 for an account of Rutledge's defeat.
22. See Scott H. Ainsworth and John Anthony Maltese, "National Grange Influence on the Supreme Court Confirmation of Stanley Matthews," 20 *Social Science History* (1996), pp. 41–62.
23. For detailed accounts of both Parker and Haynsworth, see Maltese, *The Selling of Supreme Court Nominees*, chapters 4 and 5.
24. "The Electoral Count," *New York Times* (January 30, 1881).
25. Douglas Ginsburg did not, but he withdrew before his nomination was formally sent to the Senate.
26. Jeffrey Segal, Charles Cameron, and Albert Cover, "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Nominations," 36 *American Political Science Review* (1992), p. 111.
27. Richard Fleisher and Jon R. Bond, "Congress and the President in a Partisan Era," in *Polarized Politics: Congress and the President in a Partisan Era*, ed. Jon R. Bond and Richard Fleisher (Washington, D.C.: CQ Press, 2000), pp. 3–4.
28. Gary C. Jacobson, "Party Polarization in National Politics: The Electoral Connection," in *Polarized Politics*, ed. Bond and Fleisher, pp. 19–23.
29. Jeffrey M. Jones, "Obama's Approval Most Polarized for First-Year President," *Gallup.com*, January 25, 2010, <http://www.gallup.com/poll/125345/Obama-Approval-Polarized-First-Year-President.aspx>.
30. Jeffrey M. Jones, "Obama's Approval Ratings More Polarized in Year 2 Than Year 1," *Gallup.com*, February 4, 2011, <http://www.gallup.com/poll/145937/obama-approval-ratings-polarized-year-year.aspx>.
31. Gallup polls of July 5–7, 2009, July 5–7, 2010, and July 5–7, 2011, available along with all other daily tracking polls from Gallup at http://www.pollingreport.com/obama_job1.htm.
32. For a full account of the process, see: John Anthony Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," 5 *Journal of Appellate Practice and Process* (Spring 2003), pp. 1–28.
33. "The Candidates on Legal Issues," 78 *American Bar Association Journal* (October 1992), p.2 of online LexisNexis version.
34. "The Candidates on Legal Issues," p. 1 of online LexisNexis version.
35. Carl Tobias, "Choosing Judges at the Close of the Clinton Administration," 52 *Rutgers Law Review* (Spring 2000), p. 831.
36. Tobias, "Choosing Judges," p. 835.
37. Federal judicial districts all fall within the confines of a single state. By tradition, judges who staff district courts reside in the state where the district sits and the senators from that state (the so-called home-state senators) exert considerable power in the confirmation process.
38. Tobias, "Choosing Judges," p. 837.
39. Quoted in: James Bennet, "'Judicial Dictatorship' Spurns People's Will, Buchanan Says," *New York Times* (January 30, 1996), p. A9.
40. Quoted in Henry Weinstein, "Drive Seeks to Block Judicial Nominees," *Los Angeles Times* (October 26, 1997), p. A3.
41. Michael Kelly, "Judge Dread," *New Republic* (March 31, 1997), p. 6.
42. Ronald Brownstein, "GOP Stall Tactics Damage Judiciary, President Charges," *Los Angeles Times* (September 28, 1997), p. A1.
43. William H. Rehnquist, 1997 *Year-End Report on the Federal Judiciary*, p. 7 [copy available at <http://www.supremecourtus.gov>].
44. Statistics for Franklin Roosevelt through George W. Bush can be found in a chart accompanying Neil A. Lewis, "Bitter Senators Divided Anew on Judgeships," *New York Times* (November 15, 2003), p. A1.

45. Thomas B. Edsall, "Democrats Push Bush for Input on Judges," *Washington Post* (April 28, 2001), p. A4.
46. "Judicial emergencies" denote federal district court vacancies where filings per judge exceed 600 and federal court of appeals vacancies where filings exceed 700 per judge.
47. Jennifer Bendery, "White House Poised to Take on Judicial Vacancy 'Crisis,'" *Huffington Post*, June 13, 2011, http://www.huffingtonpost.com/2011/06/13/white-house-poised-to-take-on-judicial-crisis_n_876185.html.
48. Meredith Shiner, "Senate GOP Filibusters Goodwin Liu," *Politico*, May 19, 2011, <http://www.politico.com/news/stories/0511/55320.html>.

Reading 28

The Tea Party at the Election

ZACHARY COURSER

The question on most every American political observer's mind in 2010 was "What is the Tea Party?" For a term freighted with such importance by journalists, politicians, and activists, there was little consensus on what exactly this phenomenon was, much less what effect it would have on the midterm elections. Post-election, the Tea Party proved to be a grassroots movement that was initially spurred by economic crisis and gradually pulled within the Republican Party. It is more appropriate to call the Tea Party a "movement" rather than to suggest it had the character of a political party. Many groups and individuals attempted to organize, mobilize, or define the movement to give it the character of a political party (as its name suggests), but it never rose above the level of a disorganized protest movement.

There was no single actor or group that could claim to have directed the national energies of Tea Party sentiment to a single purpose. This lack of coordination gave the Tea Party's message and purpose a slippery nature that allowed candidates and groups to take advantage of the "Tea Party" label without having to define their beliefs fully or commit to a specific platform. There was no formal process of joining the movement, and one could not contribute money or volunteer for a national Tea Party. One could associate with groups or candidates that labeled themselves as part of the Tea Party, participate in marches or rallies organized by these self-identified groups, or attempt to organize a group independently. This lack of formal structure allowed the movement to grow quickly, albeit chaotically, beginning in early 2009. It also contributed to a chronic inability of the movement to organize as a distinct political interest.

The Republican sweep of the House in the midterm elections has focused attention even more on the Tea Party movement. Of the 63 seats that Republicans picked up, 42 were won by candidates that could be considered in some way associated with it (Table 28.1). The success of House candidates who en-

tered into politics through the Tea Party movement or who received significant support from it during the 2010 midterm election, all of whom ran as nominees of the Republican Party, was very strong in Republican-leaning districts. Their record in districts that were considered toss-ups was also strong. Judging from early indications, like voluntary earmark bans in the House and Senate, the Tea Party movement has made a strong impression on Republican legislators.

Representative Michele Bachmann of Minnesota and Senator Jim DeMint of South Carolina have associated themselves with the movement, and Bachmann now leads her own Tea Party caucus in the House. There is a desire among many Tea Party groups and affiliated candidates that the movement continue beyond the 2010 midterm election and continue to influence national politics. There are already plans for CNN to co-host a Labor Day 2011 debate among Republican presidential candidate with the Tea Party Express, an organization that supported a variety of candidates in 2010. But how long the Tea Party movement will endure beyond the 2010 midterm elections remains very uncertain.

Considering that there are no plans for formal rule changes in the House or Senate regarding earmarks, and that key committee assignments and committee chairs are going to traditional, non-Tea Party Republicans, it is very possible the policy influence of those freshmen Tea Party candidates who managed to get elected will be limited in the next Congress. The commitment of Republicans in Congress to the Tea Party reform agenda is in question. For example, the "Tea Party Caucus", established by Rep. Bachmann in June of 2010, has not exactly distinguished itself during the lame-duck session: 38 of its 52 members requested earmarks for their districts in the 2011 federal budget, amounting to over a billion dollars. If Bachmann cannot hold her caucus together well enough in the afterglow of a historic Republican House victory to reach a consensus on banning earmarks, the ability of Tea Party members to organize effectively to influence legislation seems uncertain.

While it is still early to draw conclusions about the future of the Tea Party movement, its chronic decentralization and lack of organization suggests it

TABLE 28.1**Tea Party Success Rate in 2010 Midterm Elections**

	Race Rating	Won		Lost		Total
Senate	<i>Republican/Leaning</i>	4	80%	1	20%	5
	<i>Tossup</i>	1	33%	2	66%	3
	<i>Democrat/Leaning</i>	0	0%	1	100%	1
	Total	5	55%	4	45%	9
House	<i>Republican/Leaning</i>	19	100%	0	0%	19
	<i>Tossup</i>	15	63%	9	37%	24
	<i>Democrat/Leaning</i>	8	9%	78	91%	86
	Total	42	33%	87	67%	129

Sources: CNN/New York Times

will not endure very long beyond the midterm. During the election season, its anarchic nature prevented intensely felt but loosely defined sentiments among a significant portion of the electorate from forming into a competent electioneering organization. Most of the fundraising and campaign work of the movement was done by select groups of political professionals like FreedomWorks, the Tea Party Express, or the Republican Party itself. The local Tea Party groups that formed nationwide did little to raise money or volunteer for candidates. Moreover, those in the electorate that identified as supporters were not very interested in campaigning or getting candidates elected. They were mostly interested in maintaining their independence from national groups and continuing to raise awareness about their political concerns. As long as the vast majority of Tea Party supporters continues to resist organization, the effective translation of their political concerns into policy change seems very unlikely.

The primary reason that the Tea Party movement has continued to be disorganized is the resistance of the independents within its ranks to associate with a political party. Also, the limited skills and experience in political mobilization of its membership make organization a challenge. Instead of laying the expensive, time-consuming, and challenging groundwork that would have been required for a true Tea Party mobilization effort, such as holding conventions, drafting platforms, electing leadership, and nominating candidates, Tea Partiers continue to be isolated, independent, and unwilling to become fully a part of the political process.

As a consequence, the movement has been effectively co-opted by the Republican Party, so that its long-term prospects as a distinctive voice in national politics are very uncertain. This article examines the electoral effects of the Tea Party movement on the 2010 midterm elections. However, it also offers some speculation on what the recent Tea Party experience tells us about the state of participatory politics in America, such as the frailty of mobilization infrastructure coupled with the incipient desire of an increasing number of inexperienced citizens to engage in electoral politics.

EMERGENCE OF THE TEA PARTY MOVEMENT

When the Republican Party lost control of the House in 2006, the perception held by independent and conservative voters was they had abandoned their skepticism of government and the dedication to fiscal responsibility that they had sounded during the 1994 midterm election. The increasing federal deficit, combined with a gradual expansion of the size of the federal government, alienated conservatives as well as Perot independents who had been successfully courted by Republicans twelve years before. The perception that Republicans had ceased to be the party of small government and fiscal responsibility was reinforced by the mortgage bubble bursting in 2008 and the global financial crisis it precipitated.

Reflecting on this period, Dick Armey, former House Republican Majority Leader, and Matt Kibbe, both of the Tea Party organization FreedomWorks, wrote in their Tea Party manifesto that “we find it hard not to blame Republicans for much of our current predicament. The Bush administration, aided and abetted by many Republicans in the House and Senate, virtually erased any practical or philosophical distinction between the two parties” (Armey and Kibbe, 2010).

With no independent or third-party figure like Perot to represent or give voice to anti-establishment protest, voters shifted overwhelmingly to the Democratic Party in 2008, sweeping Republicans out of the White House and further diminishing their numbers in Congress. The repudiation of Republican candidates was profound: congressional Democrats penetrated deeply into districts that had supported McCain in 2008 and Bush in 2004. When the new Congress convened in 2009, Democrats held 68 seats in the House that had a positive Republican Cook Partisan Voting Index (PVI) score.¹

In January of 2009, with Republicans discredited and completely out of power in Washington, Democrats were faced with the unenviable task of finding a way out of the lingering economic crisis. The Bush administration had pushed through the Troubled Asset Relief Program (TARP) the year before, authorizing up to \$700 billion in government funds to purchase the bad debts of banks, and had participated in various multi-billion bailouts of AIG, Bear Stearns, and other private companies during the onset of the crisis. Democrats, newly in power, weighed in with a stimulus package valued at \$787 billion in February along straight party line votes in the House and Senate, followed by an array of costly programs aimed at increasing consumption and employment, stabilizing the credit market, and arresting the flood of mortgage foreclosures.

By early 2009, the price tag for all these recovery programs had grown to an estimated \$2 trillion dollars. Rick Santelli's now-infamous comments in February of 2009 on CNBC were a reaction to the government's plans for economic recovery. He stated "the government is promoting bad behavior" and the Democrat's plan was flawed because "you can't buy your way into prosperity." Santelli's anger and frustration struck a chord with many Americans and his call for a "Tea Party" gave a name to what became a rapidly expanding nationwide protest movement. Just two months later, on Tax Day, April 15, 2009, over 750 "tea parties" protesting government spending were held across the country.

The ire of those grassroots groups about excessive government spending soon directed itself at the Obama administration's proposed healthcare reform bill in the summer of 2009. Democratic and Republican congresspersons, visiting constituents during the August recess that year, found their town hall meetings filled with many constituents angry about the healthcare bill. Representative Brian Baird (D-WA) was so taken aback at the intensity of citizen anger that he canceled his town hall meeting, decrying "a lynch-mob mentality" among participants and the "brownshirt tactics" of protestors. Baird's office had received death threats prior to his town hall, and he opted instead for a conference call where constituents could call in to voice their opinions.

On August 10, House Speaker Nancy Pelosi and Majority Leader Steny Hoyer published an editorial in *USA Today* calling the protests "un-American," and the angry outbursts "an ugly campaign . . . to disrupt public meetings and prevent members of Congress and constituents from conducting a civil dialogue." Pelosi had dismissed the Tea Party movement earlier in April, calling it "Astroturf," that is, phony-grassroots displays organized by "some of the wealthiest people in America to keep the focus on tax cuts for the rich instead of for the great middle class." By August, dismissing the outpouring of protest to healthcare reform as Astroturf was becoming difficult, and members of the

Democratic caucus were taking note. In December, Baird announced his intention not to seek re-election, following many prominent Democrats facing tough re-election battles, including Senators Evan Bayh of Indiana and Byron Dorgan of North Dakota, and House Appropriations Chair David Obey of Wisconsin.²

In September, the Tea Party movement had its first nationally organized event, the “Taxpayer March on Washington,” a protest that attracted participants from all over the country. The number of those who attended is highly disputed, with estimates ranging from 70,000 by ABC News to over a million by organizer FreedomWorks. The event developed from the “9–12 Project,” promoted by Fox News personality Glenn Beck to gradually include all the major organizations that described themselves as part of the Tea Party movement up to that point. FreedomWorks, Tea Party Patriots, and the Patriot Action Network served as the national coordinators. According to FreedomWorks, the only limitation to joining in the effort was a commitment to “individual freedom, fiscal restraint, and respect for our Constitution.” Furthermore, any elected official that had supported TARP or any of the bailouts of the Bush or Obama administrations was not allowed to join the march.

Matt Kibbe, FreedomWorks president and CEO, wrote that there was little formal organization at the event because organizers “wanted the event to reflect the ethos of the Tea Party, the leaderless nature of this spontaneous order.” The description seems apt: the nearly three-hour procession included few speakers and little organized content. Most of the political statements made that day were contained on the plethora of handmade signs that participants displayed during the march, announcing patriotic slogans, decrying government overspending, or attacking the healthcare bill. The lack of focus or centralized leadership at the march reflected how the movement continued to resist limiting itself to specifics or uniting under a leader as it headed into 2010.

In November of 2009, Republicans won governorships in Virginia and New Jersey, and many commentators looked at the shift as a referendum on Democrat proposals on healthcare and spending. The most remarkable upset occurred in January of 2010, when Republican Scott Brown defeated Democrat Martha Coakley in the special election for Massachusetts’ vacant Senate seat. It is not practically possible to credit the Tea Party movement with these Republican successes in late 2009 and early 2010, as the groups and major figures most associated with it only worked in the margins of these campaigns.

For example, Brown did not describe himself as a Tea Party member, nor did he seek the endorsement of Tea Party figures and organizations.³ Indeed, when the Tea Party Express arrived in Boston Common in April of 2010, Senator Brown was nowhere to be found. However, the chaotic summer of Tea Party discontent did have an effect: the wave of opposition felt that summer and fall exasperated many Democrats and emboldened Republican candidates to focus their attacks on the healthcare bill and government spending. By the spring of 2010, a critical mass of groups and candidates had formed claiming to be part of the Tea Party, and their direct involvement in campaigns was felt during the Republican primaries for the 2010 midterm election.

WHO ARE THE TEA PARTIERS?

Early in its emergence as a distinctive political movement, the Tea Party was derided by Democratic Party leaders as “Astroturf,” fake grassroots activism organized by traditional conservative groups. Mass protest gatherings like the “Taxpayer March on Washington” in September of 2009, or Glenn Beck’s “Restore Honor” rally in August of 2010, suggested that it was instead a legitimate grassroots movement. The truth is somewhere in between. Experienced professionals behind organizations like FreedomWorks and the Tea Party Express helped to give the movement an initial boost and direction. Emphasis was placed on a community organization model by FreedomWorks, who encouraged citizens to be trained as activists and protest in their communities for political change. The Tea Party Express, a nationwide bus tour of celebrities, entertainers, and activists organized by Sal Russo & Associates of Sacramento, California, put emphasis on raising awareness and generating support for individual candidates running as Tea Partiers.

Both groups attempted to preserve the disorganized nature of the movement, and encouraged would-be supporters to band together in small local chapters. What has resulted from the emphasis among “Big Tea” groups on decentralization and grassroots legitimacy is a mass of largely inactive “activists” who are uncertain about their goals. The political creed of the Tea Party movement, with its emphasis on promoting activism grounded in independence and atomism, has created something of a political chimera: a popular movement without leaders, focus, or direction.

The focus from Freedom Works for the Tea Party was one of promoting citizen activism and organizing protest. In their “Tea Party manifesto,” several positive references are made to Saul Alinsky’s *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* (1971). President Obama himself was a community organizer in the style of Alinsky in Chicago early in his career, so the embrace by FreedomWorks of these methods for the Tea Party seems unusual. Yet their approach to organizing does have a strong antipathy for leadership and formal structure, with a preference for giving would-be activists the tools to protest as autonomous chapters. FreedomWorks thus devoted nearly half of its manifesto to a “Grassroots Activism Toolkit” that teaches the methods and techniques Tea Party activists need to form chapters and engage in protest. FreedomWorks holds that “a decentralized model for social change is most consistent with the values of independence, self-reliance, and personal liberty that embody America” (Armey & Kibbe, 2010).

The Tea Party Express began as a bus tour, paid for by the Our County Deserves Better PAC. The PAC was initially organized in 2008 to oppose the election of Barack Obama by Russo & Associates, a Republican political consulting firm based in California. The tour was the brainchild of Sal Russo, a former aide to Ronald Reagan and a longtime fixture in California Republican politics. Capitalizing on the power of the “Tea Party” label to generate popular interest, Russo’s bus tour crisscrossed the country with a retinue of singers, entertainers, and keynote speakers like Sarah Palin.

Tea Party Express rallies consisted of patriotic songs led by conservative entertainers, voicing support for American troops, and promoting Tea Party candidates in a carnival atmosphere. The platform of issues the tour promoted was vague. For example, at a Tea Party Express stop in Boston in April of 2010, Sarah Palin's keynote address consisted mostly of issues that harkened back to her 2008 race with John McCain, like increased oil drilling in America. Many who spoke at the rally celebrated the country, its culture, and its history without talking specifically about issues.

But the group did much more than hold rallies and celebrate America. Russo targeted races in small states like Alaska, Delaware, and Nevada, where Republicans were competitive statewide, to influence Republican primaries toward selecting conservatives who supported Tea Party issues. The rise of Sharon Angle in Nevada as a serious candidate for the Republican nomination for Senate started with endorsement by the Tea Party Express in April of 2010. Christine O'Donnell was likewise made a serious political force in Delaware with support of the Tea Party Express, and managed to defeat the preferred candidate of the Republican Party in the Senate primary. Joe Miller, another virtual unknown before involvement by the Tea Party Express, managed narrowly to defeat incumbent Senator Lisa Murkowski in a divisive primary race in Alaska thanks to its help: Russo's PAC spent nearly \$600,000 to defeat Murkowski.

FreedomWorks and the Tea Party Express were generating grassroots interest in the Tea Party nationwide. Local Tea Party groups simultaneously began to form in a spirit of decentralized, independent protest. There was a great deal of speculation on how these grassroots groups would affect the midterm elections or the fortunes of the Republican Party. While the Tea Party Express was undermining traditional Republican candidates in a conventional, professional campaign to nominate conservative candidates, these small groups were largely inert and confused when it came to how to engage in the political process. The internet site Tea Party Patriots gradually became a clearinghouse for various small groups that emerged during 2009, offering them a web presence and a means of networking with Tea Partiers around the country. Tea Party Patriots claims to represent 2,800 local groups around the U.S., though a canvass by the *Washington Post* showed that number to be greatly exaggerated.

The *Post* could only identify 1,400 unique Tea Party groups, and managed to contact only 647 despite repeated attempts. The picture painted by the responses of these groups shows an atomized, inexperienced, and leaderless movement with an ambivalence about government (Table 28.2). A plurality of Tea Party groups is unaffiliated with any larger movement, and the vast majority wish to remain a network of independent organizations. Only 4 percent of Tea Party groups want to form a third party. 86 percent reported that most of their members were new to politics. Tea Party Patriots was the organization most affiliated with, but this may mean little: the group has adopted a policy of not endorsing candidates and mostly facilitates networking between independent groups that share their core principles.

Survey data reveal that Tea Party groups and individual voters that identify with the movement are united around a nebulous set of principles regarding

TABLE 28.2**Characteristics of Tea Party Groups**

Affiliation of Tea Party Groups		National Figure That Represents the Tea Party Movement	
Unaffiliated	42%	Nobody	34%
Tea Party Patriots	32	Sarah Palin	14
Americans for Prosperity	4	Glenn Beck	7
FreedomWorks	4	Jim DeMint	6
Republican Party	3	Ron Paul	6
9-12 Project	3	Michele Bachmann	4
Tea Party Express	2	Other/DK/NA	29
Tea Party Nation	1		
Other/DK/NA	9		
Important Factors Driving Group Support		Most Important Issue for the Group	
Concern about the economy	99%	Government spending/deficit	24%
Mistrust of government	92	Limited government/size of government	20
Opposition to Obama/Democratic Party	92	Protecting the Constitution	11
Dissatisfaction with mainstream Republican leadership	87	Voter education	8
		Other	37
Purpose of the Group Is to		Size of Group	
Operate as a network of independent political organizations	57%	Fewer than 50 members	51%
Take over the leadership of the Republican Party	24	50 to 1,000 members	43
Don't Know	15	1,000 + members	6
Form a separate political party	4		

Source: *The Washington Post*, Tea Party Canvass, October 6–13, 2010. N = 649.

the size of government and fiscal policy (Tables 28.2 and 28.3). Most identify some combination of reducing the size of the federal government and lowering the deficit as their most important priorities. Distrust or a lack of confidence in government was also a common theme, and many groups and candidates put a libertarian emphasis on constitutionally limited government and individual freedoms.⁴ The distrust of government and focus on the Constitution felt among Tea Party supporters also relate to a perceived disconnect between what pollster Scott Rasmussen calls the “mainstream” and the “political class.”

TABLE 28.3

Comparing Perot Supporters with Tea Partiers

Perot Voters—1992		Tea Party Supporters—2010	
<i>Party Identification</i>		<i>Party Identification</i>	
Democrat	20%	Democrat	5%
Independent	53	Independent	41
Republican	28	Republican	54
<i>Ideology</i>		<i>Ideology</i>	
Liberal	30%	Liberal	4%
Moderate	9	Moderate	20
Conservative	60	Conservative	73
<i>Federal deficit is</i>		<i>Which is more important?</i>	
Important	60%	Lowering the federal deficit	76%
Not important	40	Government spending to create jobs	17
<i>Government wastes tax dollars</i>		<i>The main goal of the Tea Party Is</i>	
A lot	78%	Reducing the federal government	45%
Some	22	Creating jobs	9
Not very much	0.3	Electing their own candidates	7
		Something else	7
		Cutting the budget	6
		Lowering taxes	6
		All of them	18

Sources: CBS News/New York Times Poll, April 5–12, 2010 and 1992 Pre/Post National Election Study.

Rasmussen observes a divide of opinion in the electorate along lines of political elites versus average citizens during the 2010 election season. He writes that the “mainstream” distrusts political leaders, believes the government has become a special interest, and that business colludes with government at the expense of consumers and workers (Rasmussen & Schoen, 2010). The “political class” sees the opposite as being the case, but only makes up 7 percent of the electorate, compared to 55 percent for the “mainstream.” Many of the issues that the Tea Party promotes, such as lower taxes and opposition to government bailouts, are shared by Rasmussen’s “mainstream” and opposed by the “political class.”

The few books written by Tea Party groups and supporters evince a sense of fighting against elite domination in politics and attempting to restore average citizens to the fore of American politics. Angelo Codevilla, professor emeritus at Boston University, makes the divide between elites and average Americans the central thesis of his book *The Ruling Class* (2010). He writes “As voters, we become less and less relevant. The letter of the laws and the Constitution itself are become subordinate to the willful reading of same

by those in power” (Codevilla, 2010). Codevilla’s tone is one of resentment against a conspiracy of elites to enforce a kind of deferential politics where experts and government actors impose their will upon average voters.

Beyond the strong aversions to big government, federal spending, and a celebration of the Constitution, there was little in the way of specific proposals or issues during the 2010 election season from Tea Party candidates or groups. It is certain that economic and not social issues were most important within the Tea Party movement. According to a CBS News/*New York Times* poll in April of 2010, 78 percent of those who identified as Tea Party supporters said economic issues were most important to them during the midterm election season. Tea Party supporters overwhelmingly describe themselves as conservative, and a majority also identify with the Republican Party. However, 41 percent of Tea Party supporters identify as independents, and many express antipathy toward *both* parties. While it may be expected that Tea Partiers are motivated by dissatisfaction with the Democratic Party and President Obama, they are also unhappy with the Republican Party: 92 percent of Tea Party groups expressed dissatisfaction with both parties, and 43 percent of individual Tea Party voters reported an unfavorable opinion of the Republican Party.⁵ Antipathy toward the Republican Party is also reflected in the desire of 24 percent of Tea Party groups to taking over the leadership of the Republican Party as their primary purpose.

INDEPENDENTS IN THE ATTIC

The atomized, leaderless, independent nature of the vast majority of Tea Party groups during the midterm election makes their impact on its outcome questionable. It seems that a few organized, professional groups like FreedomWorks and the Tea Party Express (not to mention the Republican Party itself) did much of the groundwork that is sometimes attributed to the Tea Party movement. Only 29 percent of Tea Party groups reported campaigning for candidates during the election season, and those who did worked through the organizations of individual candidates to assist get-out-the-vote drives. Putting aside the work of the Tea Party Express, candidates who associated themselves with the Tea Party movement worked within a traditional candidate-centered model of campaigning with minimal help from independent, grassroots, Tea Party organizations.

The true strength of the movement, then, had to lie in the interest it helped to generate among an alienated minority of independents, who gave Republicans a decisive advantage in the midterm. Exit polling indicates that the Tea Party’s message resonated particularly with independents, as Republican and Democratic voters largely split the vote in their usual ways. Independents voted 56 percent for Republican candidates, and 41 percent of all midterm voters responded they supported the Tea Party movement. Its independent, anti-partisan nature suggests it will easily fragment and dissipate like previous independent movements such as the Reform Party of H. Ross Perot. If so, its legacy will be to have nudged Republicans slightly to the right on economic issues.

In fact, Perot's 1992 campaign for president has many parallels to the Tea Party movement and to the uneven fortunes of non-partisan politics.

The origins of the Tea Party do begin well before Rick Santelli's impassioned call for a "Chicago Tea Party" in reaction to a succession of government bailouts and stimulus proposals in the heat of a global economic crisis. Or at least, there has been a continual, loosely unorganized undercurrent of distrust in government and anti-establishment protest dating back to the 1992 Ross Perot presidential campaign. Perot, an iconoclastic Texas billionaire, attempted to shake the foundations of the two-party system by offering himself as a pragmatic, independent alternative for president in 1992 and 1996. While his first campaign had the appearance of a third-party movement, there was little to suggest that his "United We Stand America" organization was a proper political party.

Perot's organization was commanded by him and paid for almost entirely through his personal fortune. Perot held no nominating convention, had no popularly voted platform, and promoted no other candidates. However, Perot's campaign did attract a great deal of popular support despite its lack of popular input. Sounding alarms about the growing size of the federal debt, decrying the corruption and unresponsiveness of the two major parties, and promising to apply his pragmatic business acumen to the problems facing America, Perot led both Bill Clinton and George H. W. Bush briefly in the polls before his untimely withdrawal from the race in June of 1992.

Perot himself ceased to be a viable national political figure after his quixotic withdrawal and subsequent reentry as a candidate in late 1992. However, despite his uneven campaign, his organization managed to place him on the ballot in all fifty states. Perot received nearly twenty percent of the popular vote, the most since Teddy Roosevelt's run as a Progressive Party nominee in 1912. An analysis of Perot supporters in a panel survey for the National Election Study from 1990 to 1992 showed them to be characterized by independent political attitudes, economic fears, and distrust of government (Koch, 1998). Perot's 1992 candidacy helped to polarize attitudes against the political establishment and engaged a select group of independent, disaffected citizens in elections.

The political effects of the 1992 Perot mobilization and polarization endured beyond his first campaign for president. For example, a movement promoted by Perot that met with greater success that same year was the campaign for state legislative term limits: voters in 14 states approved legislative term limits in 1992. In 1994, an additional six states passed similar initiatives with large majorities. That same year, Republicans seized control of the House of Representatives for the first time in 46 years, also recapturing the Senate. House districts that had significant turnout for Perot (between 25 and 30 percent) in 1992 tended overwhelmingly to support Republican candidates in 1994 (Stone & Rapoport, 2001). Significant margins for Perot in 1992 also correlate with higher turnout for Republican presidential candidates in 1996 and 2000.

In 1995, Perot and his supporters created the Reform Party to transform an ongoing yet uncoordinated protest movement into a third-party organization. It is telling that their first choice of name was the "Independent Party," an oxymoron that more truly represented the contradictory impulses it represented.

The one significant electoral success under the Reform Party banner was to be the candidacy of Jesse Ventura for Governor of Minnesota in 1998. From its inception, the party was beset by internal strife over what leadership and issues would represent it, and it gradually factionalized or disbanded in the years following Perot's 1996 run for president. Ventura's own association would be short-lived: internal squabbles and disagreements caused the Minnesota state organization to break away from the Reform Party of America and factionalized into the Independence Party of Minnesota in 2000.

The Reform Party briefly provided a home for those dissatisfied with the two party alternatives, but was itself mostly an anti-party movement. Distrustful of leadership, platforms, and organization, this anti-partisan nature of the Reform Party proved its undoing. Judging from the success Republican candidates found in districts and states that voted significantly for Perot during the 1990s, it seems that many Perot voters eventually decided to go Republican. In the wake of Perot's waning popularity and the failure of his Reform Party to organize effectively, many Perot supporters found a home within the Republican Party. Without the polarizing and mobilizing effects of Perot and his anti-establishment message, the Republicans' congressional victories or the spread of term limits in the 1990s would likely have not been possible.

The issues that were commonly expressed by the Tea Party movement echoed many issues of the Perot campaign: fiscal restraint, distrust of government, political independence, and a preference for political outsiders to established candidates. One important difference is that the Tea Party movement lacked any central figure like Perot to give it a single voice or coordinated organization. Perot's run for president was the catalyst for mobilizing dissent, and he was the initial architect of the movement that became the Reform Party.

The catalyst for the formation of the Tea Party movement was the financial crisis of 2008 and the growing conviction by Republicans and independents that the country was headed in the wrong direction politically. And while many candidates and political figures attempted to capture the movement, there was a steadfast resistance by the Tea Party to control or direction. The reason for these commonalities may relate to the high number of independents that affiliated with each movement. Independents accounted for 53 percent of Perot voters and 41 percent of Tea Party supporters (Table 28.3). The strong influence of independent voters likely also introduced a weakness in the ability of both movements to organize effectively.

The individualism that expressed itself through the Tea Party movement, particularly among supporters that emphasized personal freedom and political autonomy, was antithetical to the compromise and cooperation that organizing into a distinctive political force would have required. One could almost say that there was a "weightlessness" to being a Tea Party supporter. There was little or no commitment to a program or platform, only a shared sentiment relating to an aversion to big government. It is interesting to note that when questioned about the main goal of the Tea Party movement, a paltry 7 percent of supporters responded "electing their own candidates" (Table 28.3). The movement was more about voicing protest, not engaging in electoral politics.

Political scientist Nancy Rosenblum's description of resistance to organization by independent voters is particularly apt in also describing the mentality of the average Tea Partier: "The weightlessness of independence flows from its barely suppressed antipathy to being a part of a political organization. No 'third party' should come between the independent elector and his or her vote" (Rosenblum, 2008). Much of the vagueness and varying intensity of the Tea Party movement's focus on issues likely derives from the resistance of independents within their ranks to committing to a partisan agenda.

While there is a pronounced cast of Republican identification and conservative outlook among Tea Partiers, this did not extend to embracing partisanship. For example, the FreedomWorks "Tea Party manifesto" declares "political parties . . . are always intellectually and morally inferior to principles and good ideas. . . . [They] are empty vessels, adrift on tides that can shift with the winds of political opinion." They go on to praise the lack of coordination or focus in the movement: "The Tea Party movement is decentralized. It is leaderless. No particular nominee, no executive director, no national chairman is in charge of this party" (Armey and Kibbe, 2010). As a consequence, Tea Party supporters behaved in the midterm as Rosenblum describes the typical activity of independent voters during elections: "atoms of the unorganized public bouncing off the structures of a party system" (Rosenblum, 2008).

The independent core of the Tea Party introduced volatility to the movement that kept it from forming into a distinctive political force. Certainly there was agreement among Tea Partiers—as there had been among Perot voters—that there was a fiscal crisis and a shared antipathy toward the federal government. But there were few specifics beyond these, and few signs that there was desire actively to campaign for candidates. The legacy of the Reform Party—its failure to effectively organize and agree upon a broadly acceptable platform, and its gradual disintegration and assimilation by the Republican Party—seems a likely fate for the Tea Party. If so, the ultimate beneficiary of the Tea Party movement was the Republican Party.

CONCLUSION

At the core of the grassroots Tea Party movement was a fundamental misunderstanding of the American political process. A preponderance of Tea Party activists dislike party politics and refused to combine their grassroots energies into a coordinated electoral effort. Professional groups like Tea Party Express and FreedomWorks did the work of fundraising and organization, while the mass of Tea Party groups preferred to remain aloof from electoral politics and instead voice protest. The consequence was a windfall for the Republican Party, which now directs the political fortunes of the Tea Party.

To translate widely held political beliefs into government action requires a willingness to organize and associate as a political party. The Republicans, who understand this axiom of American politics, will in all likelihood leverage their experience, membership, fundraising power, and most importantly their organization, to keep the scattered Tea Party movement in check. The exigency

of economic crisis may keep many Republican candidates attuned to the concerns of the Tea Party movement for fear of a primary challenge. However, as soon as a recovery begins, it will be nearly impossible for Tea Partiers to find common cause to remain active in politics, and Republicans will complete their takeover of the movement.

For the many amateur democrats who joined the movement with high expectations, the result of policy disappointment in Republican hands may be to discourage further their interest and faith in politics. This would be a tragic and perhaps dangerous outcome for the future of American politics. The energy that the Tea Party movement produced this election was palpable: turnout in Republican primaries was the highest since 1970, and Republicans outnumbered Democrats in primary voting for the first time since the 1930s.

The anger and dismay that the Tea Party movement expressed, however disorganized, was also real and palpable. Reflecting on my research and experience, I believe it is a reflection of the frustration of a significant number of citizens at the diminished opportunities for average citizens to participate in the political process. Professor Codevilla's comment that "As voters we become less and less relevant" is indicative of the sentiment that the Tea Party movement was not just about the economy, but also about an impotence felt by many citizens to affect the course of their government.

If those Tea Party supporters who voted Republican in 2010 are disappointed at the results they observe, they should consider embracing political association and letting go of independence as a political creed. Rather than reading Saul Alinsky, the political observations of Alexis de Tocqueville would be of greater use. Tocqueville observed that "in democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all others," and commented on how Americans in the 1830s were unusually good at combining to effect political change:

As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen.

The Tea Party movement embraces protest over organization, and independence over party politics. However, in order to be felt as an enduring and relevant political force in democratic politics, individuals must unite and organize to win elections and ultimately to legislate. The lessons Tea Partiers would learn about organization in attempting to form a third party might serve them well in their efforts to become part of the American political process. There may yet be a future for the Tea Party as a distinct political movement, but it will take much more effort and experience than was on display in 2010. After all, the Boston Tea Party of 1775 was only a first, spontaneous burst of revolutionary energy. It took a united people eight grueling and uncertain years of military and political organization to actually accomplish the political change those Tea Partiers in Boston Harbor only imagined.

ENDNOTES

1. The Cook PVI score is calculated by averaging state and congressional district voting margins for presidential candidates in the last two presidential elections. For the 2010 midterm elections, the Cook PVI averaged margins for the 2004 and 2008 presidential elections. A score of R+1 would represent an average margin of +1 percent for Republican presidential candidates in a district or state.
2. Baird later criticized “an authoritarian, closed leadership” in the House in an interview with the *Wall Street Journal* in October of 2010. He went on to say that Democrats had lost touch with the voters: “Back in September, we had pollsters and strategists from my party tell members that the mass of people didn’t care about the deficit. The mind-boggling lack of reality coming from some of the people who give us so-called advice is stunning.”
3. Massachusetts is clearly a very blue state, but it is interesting to note that while Bay State voters regularly turn out for Democratic candidates, state party registration figures show “unenrolled” voters—those who refuse to state a party preference—outnumber Democrats 51.6% to 36.5%. Brown’s campaign was certainly aware of this fact and exploited the unease of these independents over the healthcare bill and government spending to overcome their traditional aversion to voting for a Republican.
4. The influence of Rep. Ron Paul (R-TX) is likely the source of the strain of Tea Party thought that emphasized the primacy of constitutionally limited government. Paul’s 2008 campaign for president generated interest among some who eventually embraced the Tea Party movement. For example, Paul’s son Rand ran and won as a Tea Party Senate candidate in Kentucky, and 6 percent of Tea Party groups identified him as the national figure that represented the movement. See Ron Paul, *The Revolution: A Manifesto* (New York: Grand Central Publishing, 2008).
5. CBS News/*New York Times* poll, April 5–12, 2010.

REFERENCES

- R. Michael Alvarez and Jonathan Nagler, “Economics, Issues and the Perot Candidacy: Voter Choice in the 1992 Presidential Election,” *American Journal of Political Science*, Vol. 39, No. 3 (Aug., 1995), pp. 714–744.
- Dick Arney and Matt Kibbe, *Give Us Liberty: A Tea Party Manifesto* (New York: William Morrow, 2010).
- Angelo M. Codevilla, *The Ruling Class: How They Corrupted America and What We Can Do About It* (New York: Beaufort Books, 2010).
- John Fund, “Requiem for the Pelosi Democrats,” *Wall Street Journal*, October 30, 2010.
- Amy Gardner, “Gauging the Scope of the Tea Party Movement In America,” *Washington Post*, October 24, 2010.
- Jeffrey Koch, “The Perot Candidacy and Attitudes toward Government and Politics,” *Political Research Quarterly*, Vol. 51, No. 1 (Mar., 1998), pp. 141–153.
- Ron Paul, *The Revolution: A Manifesto* (New York: Grand Central Publishing, 2008).
- Scott Rasmussen and Doug Schoen, *Mad as Hell: How the Tea Party Movement Is Fundamentally Remaking Our Two-Party System* (New York: Harper, 2010).
- Nancy L. Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton, NJ: Princeton University Press, 2008).
- Walter J. Stone and Ronald B. Rapoport, “It’s Perot Stupid! The Legacy of the 1992 Perot Movement in the Major-Party System, 1994–2000,” *PS: Political Science and Politics*, Vol. 34, No. 1 (Mar., 2001), pp. 49–58.
- Alexis de Tocqueville, *Democracy in America*, George Lawrence, trans., J. P. Mayer, ed. (New York: Anchor Books, 1969).
- Peter Wallsten and Danny Yadron, “At Group’s Helm, a Seasoned Hand,” *Wall Street Journal*, September 17, 2010.
- Kate Zernike, “Tea Party Set to Win Enough Races for Wide Influence,” *New York Times*, October 14, 2010.

Policy Leadership

At the end of the 20th century, Americans were accustomed to presidents with active domestic policy agendas—whether to expand governmental programs or contract them. The large governmental programs to which we have become accustomed, however, are a product of the 20th century after the previous century of narrow governmental scope. Likewise, few presidents in the 19th century were assertive in their actions toward Congress or in their domestic policy ambitions.

Things began to change during the late 19th century with the rise of the progressive movement, and the increasing role the federal government began to play in the life of the nation. As with so many other aspects of the modern United States, however, the big change came with the presidency of Franklin Roosevelt. Just as World War II transformed forever the place of the United States in the world, so did coping with the Great Depression transform the role of the federal government in the economy and the stance of presidents toward Congress.

The initial salvo that began this revolution of governmental and presidential activism was the famous first “Hundred Days” of Franklin Roosevelt’s first term. In the depths of the Great Depression, the country was gripped by fear and virtual panic—from the heads of financial institutions, who saw the banking system collapsing around them, to the wage earners, 25 percent of whom were unemployed. But Franklin Roosevelt’s jaunty spirit and sense of humor, communicated in several “Fireside Chats,” set the stage and engendered enough public confidence and support for the flurry of legislation that would be passed in his first 100 days in office. Congress passed 15 major laws that transformed the role of the federal government in the economy and set the country on the road to eventual recovery from the Depression.

The selection by Richard Neustadt takes up the expectations that Franklin Roosevelt’s legislative achievements have created in the press. Since Franklin Roosevelt, most newly elected presidents have been given scorecards for their first 100 days in office. Neustadt argues that the Franklin Roosevelt 100 day scorecard is not appropriate for subsequent presidents. For one thing, Franklin Roosevelt had until March 4 of 1933 before he took office; this was changed to January 20th by the 20th Amendment to the Constitution. In addition, the emergency of the Great Depression has not been replicated at the beginning of any presidential term since then. Even the political unanimity

provided by the 9/11 terrorist attacks on the United States created a consensus only with respect to national security and only for a short period of time. The financial meltdown of 2008–2009 led to decisive governmental intervention in the economy. The ameliorative measures taken prevented the economic deterioration from matching the disaster of the Great Depression. The American public, however, did not see the immediate return to prosperity that it had hoped for, and political support for President Obama did not give him the same leverage that Franklin Roosevelt got out of the Great Depression.

Richard Neustadt's classic book, *Presidential Power*, first published in 1960, changed the way we look at modern presidents. Traditionally, the emphasis in presidency scholarship was on the formal powers of the presidency and the legal and constitutional aspects of the office. In his path-breaking analysis, Neustadt changed the focus to the personal influence of the individual president. He did not ignore the formal aspects of presidential power, but rather he used these as a constant given, and analyzed how individual presidents were able to use those formal powers.

John Burke's essay examines the first six months of President Obama in office. He emphasizes the important connections between the preparation for office that occurs before the election and during the transition period and how successfully a new president can hit the ground running. Burke gives Obama high marks for his carefully planned transition into office and his early policy initiatives. But Burke also points out the great challenges that faced Obama and his very ambitious policy agenda, including health care reform, financial bailouts, and energy independence. Burke's predictions came to pass, as Obama faced united and implacable opposition from Republicans in Congress as he pursued his policy priorities.

William Howell, in the next selection, argues that in emphasizing the president's need to persuade members of Congress and others with political power to support him, we often overlook the many direct powers that presidents possess that can be exercised unilaterally. Presidents have at their disposal a range of unilateral tools that can be used to accomplish their policy goals. Among these are executive orders, executive agreements, memoranda, proclamations, and reorganization plans. Howell calls attention to these important powers that are likely to be used increasingly by presidents frustrated by the unwillingness of Congress to do their bidding.

In the next selection, Richard Pious examines the policy leadership of President George W. Bush in the "War on Terror." In his policy choices in response to the terrorist attacks of 9/11, President Bush could have chosen to deal with suspects of terrorism as criminals or as sources of intelligence. Pious argues that the Bush administration chose to adopt the intelligence model and interrogate suspects for information about possible future terrorist attacks. In rejecting the criminal approach, the administration ignored a number of due process rights of defendants and thus created precedents that were challenged in court. In his essay Pious examines the consequences of President Bush's choice and points out some of the drawbacks, including the erosion of

some civil liberties and some reversals of the administration's policies by the Supreme Court.

In the final selection James Pfiffner analyzes how decisions were made in President Obama's White House by examining three key decisions—economic policy to deal with the “great recession,” how to deal with detainees in the war on terror, and the decision to escalate the war in Afghanistan. Pfiffner argues that Obama's decision-making style contrasted sharply with that of President Bush. Where Bush relied on his gut instincts and moved quickly, Obama's approach was more cerebral, deliberative, and extended. Pfiffner concludes that Obama was deeply involved in the details of his major policies and that most of his decisions led to more moderate policy positions.

SELECTED BIBLIOGRAPHY

- Cooper, Philip, *By Order of the President* (Lawrence, KS: University Press of Kansas, 2002).
- Fishel, Jeff, *Presidents and Promises* (Washington, DC: CQ Press, 1985).
- Hargrove, Erwin C., and Michael Nelson, *Presidents, Politics, and Policy* (New York: Knopf, 1984).
- Howell, William, *Power Without Persuasion* (Princeton, NJ: Princeton University Press, 2003).
- Kellerman, Barbara, *The Political Presidency* (Oxford: Oxford University Press, 1984).
- Kingdon, John, *Agendas, Alternatives, and Public Policies*, 2nd ed. (New York: HarperCollins, 1995).
- Lewis, David, *Presidents and the Politics of Agency Design* (Stanford, CA: Stanford University Press, 2003).
- Light, Paul, *The President's Agenda* (Baltimore, MD: Johns Hopkins University Press, 1982).
- Light, Paul, *A Government Ill Executed* (Cambridge, MA: Harvard University Press, 2009).
- McKay, David, *Domestic Policy and Ideology* (New York: Cambridge University Press, 1989).
- Milkis, Sidney, and Michael Nelson, *The American Presidency* (Washington, DC: CQ Press, 1990).
- Polsby, Nelson, *Congress and the Presidency* (Englewood Cliffs, NJ: Prentice Hall, 1986).
- Shull, Steven, *Domestic Policy Formation: Presidential—Congressional Partnership* (Westport, CT: Greenwood Press, 1983).
- Spitzer, Robert J., *The Presidency and Public Policy* (University, AL: University of Alabama Press, 1983).
- Sundquist, James, *Politics and Policy* (Washington, DC: Brookings, 1968).
- Wildavsky, Aaron, *The New Politics of the Budgetary Process* (Glenview, IL: Scott, Foresman, 1988).

Reading 29

The Presidential “Hundred Days”

RICHARD E. NEUSTADT

The “Hundred Days” of 1933, a term the American media had borrowed from French history, was used to denote Franklin D. Roosevelt’s great success with Congress in and after that year’s banking crisis. Ever since, the term has been used analogically by journalists to measure the effectiveness of newly elected presidents in their first legislative session and also has been used by certain presidents-elect to plan their post-inaugural strategies.

The analogy, however, is not apt. Roosevelt’s Congress had come into special session at his call, amid emergency conditions, widely perceived as such. Subsequent presidents have dealt with Congresses in regular session, facing lesser problems, while 100 days reaches only to the Easter recess of a modern Congress, not a date for finishing most bills. Even LBJ in 1964, though not a president then elected, faced only a psychological emergency created by his predecessor’s murder. And that he rode to early legislative triumphs at the later cost of escalation in Vietnam, imprisoned by his own initial pledge, “let us continue.” The next year, newly elected in his own right, Johnson’s coat-tails carried with him the largest Democratic majorities in both Houses since Roosevelt’s heyday. With these, in the course of two regular sessions, Johnson launched and carried through the measures for his Great Society.

The original “Hundred Days” had nothing whatever to do with the United States. In the spring of 1815, the former emperor of the French, Napoleon I, escaped from Elba, where he had been exiled after his abdication of the year before. Returning to France, he rallied the army, regained Paris, restored his rule, prepared to fight the rest of Europe still arrayed against him, and at Waterloo in Belgium was decisively defeated. Thereupon, he had to abdicate again and this time was transported far away, to St. Helena in the South Atlantic. This coda to his reign in France lasted 100 days and was so labeled by historians.

In 1933, when Americans swiped that label, FDR had been sworn in on March 4 (under constitutional provisions before the Twentieth Amendment), while the “lame-duck” session of Congress had adjourned the day before, and the new Congress was not scheduled to meet until the following December. But in March, the country was gripped by financial disaster crowning three years of deepening depression. Banks were failing on every hand. Desperate depositors were losing their life’s savings. Desperate businesses were short of cash. Roosevelt at once took executive measures, but he needed legislative

authority for more and so called the new Congress into special session. Somewhat to his surprise, he found it so compliant in the face of the emergency that he kept it in session for three months and bargained through it 16 major bills, many of them newly improvised, such as the National Industrial Recovery Act, and some previously kicked around for years, such as the Tennessee Valley Authority. In sum, they constituted what became known as the "First New Deal."

When FDR ran low on measures and found members running out of steam, he prudently dismissed them and from June until December governed with the Congress out of town. From his call until adjournment, that special session had lasted 100 days. The press affixed to it the Napoleonic designation.

Ever since, journalists have speculated in advance and summed up after a new president's first 100 days—with Congress routinely in session (thanks to the Twentieth Amendment)—while his legislative success, compared to Roosevelt's, is often at the heart of their stories. And not journalists alone, but also incoming presidents and still more their staffs have often adopted this yardstick, prospectively, before their inaugurations, in commenting on what they hoped to do. Bill Clinton was notorious for this after the 1992 election. Some of them, moreover, have centered their planning on the first three months in office. Ronald Reagan's staff is a notable example. Scholars also have tended to generalize: claiming the early months of a new term as the most advantageous time for presidents to make their mark on Congress. Avowedly or implicitly, Roosevelt—and Reagan—are frequently invoked.

Journalists and scholars read each other, while presidents-elect, or at least their aides, read both. Accordingly, in Rooseveltian, not Napoleonic terms, the tag "100 Days," as measurement and opportunity alike, now seems to be entrenched in the conventional wisdom of our politics.

Analytically, this is unfortunate for at least three reasons. The first relates to conditions produced by the Twentieth Amendment itself. The second relates to the character and timing of congressional "honeymoons" with newly elected presidents. The third relates to their usual ignorance about the ways and means of some (or all) institutions "inside the Beltway." Let me take these three in turn.

The Twentieth Amendment to the Constitution was designed to ensure that the four months of Herbert Hoover's lame-duck status after FDR's election, in the midst of a burgeoning financial crisis, would never occur again. Henceforth, the new Congress would meet in regular session on January 3 of the year after November's election, with the new president inaugurated on January 20. This might have helped with the banking emergency of 1932–1933. It also put an end to lame-duck sessions of the outgoing Congress, which had long been thought unsatisfactory. But in other respects, the new timing was profoundly disadvantageous for incoming presidents.

Formerly, elected presidents had had four months before the inauguration to choose their cabinets and personal aides, while appraising the condition of the country, and then nine months in office to accustom themselves

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to one another, learn the ropes in the executive establishment (and in press relations), review policies, and ponder budgets—all before Congress and its committees hove on the scene. If Congress arrived earlier, it would do so only in special session on the president's call, for the limited purposes he chose. Even Abraham Lincoln, with the Union dissolved and hostilities beginning, gave himself and his associates from March until June before calling Congress into special session.

How good that looks now, from the standpoint of an incoming administration, and how unattainable! Instead, the new Congress is in session three weeks before the inauguration, with its committees organized, impatiently awaiting the new president's initiatives. Moreover, because for half a century, one or both Houses have usually been organized by the political party opposed to the president, impatience has an undertone of negativity.

② This brings me to my second point. Congress, institutionally, is suspicious of "downtown," being competitive with the White House for control of federal agencies, their programs, and their budgets and licensed by the Constitution to compete. So Congress does, in modern times most notably through its extensively staffed subcommittees and its partisan floor leaderships. Because the latter are so frequently opposed to the White House in national politics, the competition is necessarily heightened, with party-enhancing institutional motives. Constituency motives heighten it still further. "All politics is local," as a recent speaker said, and all congressional constituencies differ, not alone from one another but also from the president's.

Thus, the presumed advantages, in legislative terms, of the first 100 days for new administrations cannot be said to rest on any special institutional, partisan, or constituency preferences binding congressmen and senators to newly installed presidents. On the contrary, those underlying motives to compete with the White House seem as much a factor in congressional life at the outset of a presidency as later. What, then, explains the widely reported readily observable "honeymoon"—by way of courteous manners and procedural accommodations—most incoming presidents appear to get from Congress? The answer seems to lie in public opinion or, more accurately, in public sentiment as gauged by congressmen themselves and by their party leaders, drawing on polls and on press treatment of the new regime downtown.

From long experience, the judgment on the Hill appears to be that in the first weeks after the inauguration, most Americans wish their new president well and want him to succeed, with partisanship relatively low, interest in him relatively high, and interest fueled by curiosity about him in his new, never-before-seen capacity, not as one party's candidate but as the country's magistrate. The congressional instinct, therefore, crossing party lines, is to repress most overt signs of rampant competition until that public mood is seen to fade, as judged by media reactions, constituent expressions, and polls. Then, as an institution, Congress bounces back to its accustomed stance of vocal, procedural, and substantive competitiveness with the president.

In modern times, the congressional reflection of a public "honeymoon" has not endured for more than about six months. In the air-conditioned era,

the first session of a Congress far exceeds that limit, with final action on most controversial bills occurring later. So "honeymoons" are marginal, at best, in deciding a new president's success with legislation. The Reagan case, so often cited as exceptional, is less different than it seems, although his gallant response to attempted assassination, coupled with his concentration on a nominally single target, the budget, and Democratic shock after losing the Senate, changed both public and congressional parameters for the time being.

The third reason to discount the efficacy of a newly elected president's first 100 days is ignorance, his own and that of his associates. If he has not already held high executive office at the federal level—as only Dwight D. Eisenhower, Richard M. Nixon, and George H. W. Bush have done since FDR—he will be ignorant of many things he urgently needs to know yet can learn only by experience all through the 100 days and for months after. So those early months are exceptionally hazardous as well as marginally advantageous. Hazards transcend the legislative sphere and include executive operations, where even a vice president's experience is not a certain guide to presidential knowledge.

A classic case of ignorance-as-hazard is that of John F. Kennedy in planning for the Bay of Pigs, the covert invasion of Cuba, which exiles attempted under CIA direction on the 87th day of his incumbency. When the director of the CIA urged his approval, Kennedy did not know that the man spoke for only one part of it, the covert operations that had made the plan and loved it. The agency's analysts, who would have scoffed, had been kept uninformed, as not needing to know. Moreover, being told by the joint chiefs of staff, to whom he had insisted on referring the plan, that it had a "fair" chance of success, he took "fair" as next to good, whereas the chiefs of staff, evidently, meant next to poor. When Kennedy then chanced the plan, moving the landing site to lessen the "noise level" (thereby unintentionally placing it on the wrong side of a swamp from the mountains, a site that the invaders were to use as their escape hatch), he assumed that the joint chiefs of staff would comment on the change without being asked. Because it was not their operation, they would not and did not. Finally, JFK thought that when he barred use of American forces, the CIA and joint chiefs of staff would take him at his word. Having dealt some years before with Eisenhower, who had been prepared to eat such words, if necessary, they assumed Kennedy would do the same and acquiesced in further changes that made overt U.S. intervention all but essential. There upon, to their horror, Kennedy pretty much kept his word and let the invasion fail.

From all that, Kennedy learned a great deal, which was and is important compensation.

Ignorance, in this sense of personally not knowing, is complemented by ignorance in the sense of institutional inexperience. With the Bay of Pigs, the CIA had never before attempted a covert operation on such a scale, nor had the joint chiefs of staff been called on to comment hastily on someone else's war plan. Ignorance in this second sense is no respecter of the line between executive and legislative branches. In June 1977, when President Carter allowed

Budget Director Bert Lance to go to the Senate Committee to seek modification of the terms of his confirmation, neither they, nor indeed the committee chairman, seemed aware how exceptional such a request would be and thus how likely to intrigue at least some journalists in an otherwise slow summer.

And in February 1981, when Reagan sent to Congress the most sweeping revisions of the budget and of taxes ever attempted by an incoming administration, he rationalized it with an economic scenario, termed “rosy” by associates, that suffered from the haste with which the package had been put together and within weeks was acknowledged by his budget director as plain wrong. Faced by the choice of repudiating that scenario, hence modifying his proposals, Reagan understandably decided to stick with both. This set the stage for outsized budget deficits in later years. He then found virtues in them but would not have planned them consciously. They were the unintended consequences of a huge and novel effort, pursued in haste by his incoming aides on top of hard-pressed civil servants.

Ignorance of the first sort will be inescapable for many or most presidents-elect. This is all the more reason why ignorance of the second sort should be avoided whenever possible by new administrations. Innovations, to be sure, will be desired and desirable in its first months. But those requiring the relevant parts of government to act in wholly unfamiliar ways perhaps should be delayed at least until the major players’ personal ignorance has been overcome. How else to deal with the shortcomings of Reagan’s budget director?

For that rarity, a newly elected president with vice presidential experience, such as in Nixon’s case, there has been a long interval between one post and the other; past experience is not a guarantee of understanding every facet of the presidency he inherits. If the vice presidency has been the incoming president’s immediate preceding office, separated only by his campaign, he may know everything about his new job except how it feels to be in it, which he undoubtedly will have imagined, sitting on the side, watching mistakes made, but perhaps imagined wrongly, as compared with how he would perform if actually in—and on—the spot. His early months will thus involve not “learning” so much as adjustment of perspective—which is best done consciously.

For a newly elected president fresh from the vice presidency, there is, besides, a special hazard in his first 100 days and even after. At least I judge so, on the strength of tales told by associates of our sole modern example, George H. W. Bush. In late 1988 and early 1989, all sorts of people in the Reagan administration, cheered by their party’s victory, with all sorts of views and plans for their departments on their own next steps, had to be disappointed, gently moved aside, or quietly disposed of so the incoming president could interject his views and plans with people of his choice. What for new presidents of other sorts is an open changing of the guard was for Bush an almost covert one, involving far less brashness and decidedly more tact than usual—and stretching far into the spring. Coping with his problems is presumably a challenge for any successor in a comparable situation.

Reading 30

Obama Becomes President: Policy Development and Leadership

JOHN P. BURKE

Presidential transitions to office have increasingly become recognized as consequential to the performance and effectiveness of new presidential administrations.¹ Jimmy Carter and Bill Clinton both had transitions that weakened the policy efforts of their early presidencies; Ronald Reagan and George W. Bush, by contrast, used that time more productively.

Efforts to plan for a possible transition now begin well before Election Day, sometimes even before the presidential candidates have cinched their party's nomination. At a minimum, candidates and their transition advisers must begin to think about the organization of the transition, its leadership and personnel, budgetary constraints, legal issues, financial disclosure requirements and other ethics matters for potential administration appointees, as well as gathering information about a range of tasks that will confront them, after Election Day. Some transitions have been more robust in their pre-election efforts: consideration of possible appointments to key cabinet and White House positions as well as beginning to plan for the new administration's policy agenda. But there are often trade-offs: The more that is done can sometimes raise concerns of the campaign war room that a new group is taking over, potentially deflecting efforts at the immediate goal at hand: winning the presidential election. A more ambitious effort might also raise the attention of the news media and lead to negative press reports about "measuring the White House drapes" too early.

After Election Day, the pace quickens, to say the least. Expectations are high—and speculation is rampant—concerning the announcement of key cabinet and White House positions. Not only does this involve selection of candidates for cabinet slots, but steps must start in filling some 500 subcabinet jobs requiring Senate confirmation (This is a process that will last months, and sometimes longer, into the new administration). Work must also begin to fill another 2,500 or so jobs that are subject to presidential appointment. The White House staff must also be assembled—another 2,000 or so slots that must be filled. Even more importantly, the staff's internal core must be organized and defined. There is virtually no statutory or legal constraint on how the "West Wing" is structured or operates, and this is usually one of the main tasks for the chief of staff-designate, among others, to work out. Very few positions are subject to Senate confirmation, so there is a greater degree of freedom in making appointments (especially the two most important—White House chief of staff and NSC advisor). The catch is that the chief of staff must be named early (so too for the

NSC advisor in that policy area) enabling the rest of the staff to be put in place and White House internal organization set by Inauguration Day.

For journalists and political pundits, transitions mark a period of intense scrutiny of the new team as it shifts from campaigning to governing. Mistakes made are taken as signs of a lack of preparation and inexperience, but, more importantly and potentially damaging, as a signal of possible problems in “presidential management” of a new administration. Any initial perceptions of incompetence are hard to disabuse later on. For the public, transitions are a time to become acquainted with their new national leader, no longer a partisan candidate. Public perceptions, in turn, have increasingly become the object of the transition team’s attention; a turn to governing has begun, but the “campaign” is not quite over. Indeed, it is never really over given the extensive communications apparatus needed to “sell” a president’s program that is now an ongoing part of the institutional presidency.

Policy development is another—and for us an important—piece of the puzzle. During the transition, policy teams are created to hone a myriad of campaign promises into a more limited agenda for the new Congress. Errors during this time can really hurt a new presidency: Carter’s laundry list of proposals when he took office; Clinton’s distraction over the gays in the military issue and the misstep in tapping Hillary Clinton to lead a closed process for engineering a comprehensive health-care proposal to Congress. Other teams are created for each department, agency, and commission. The effort is to get a sense of the lay of the bureaucratic land, but also to assess policy needs. What legislation is up for reauthorization? What policy changes need to be made?

In short, presidential transitions to office are a daunting task. Their most obvious concern is to put—as best they can—an administration in place by day one. Yet policy development and achievement are the ultimate aim, wrapping themselves around all these efforts and serving as their horizontal goal. Cabinet and White House appointments figure into the creation of a presidential decision-making process, one directed at policy deliberation and choice. In addition, announcement of appointments are now often “rolled out” in policy-thematic public events, emphasizing agenda concerns and beginning to spell out policy proposals. Molding public and media perceptions about the transition are aimed at building wider support, and avoiding any weakening of the soon-to-be president’s power position. So too are events with a variety of constituency groups. Efforts to court Congress during the transition—to “build bridges”—are a more direct instrument to secure policy success.

Transition efforts in all these areas are also framed by the “internal time” of a presidency. Budgetary and tax priorities must be set by February, in time for the president’s economic address to Congress and the beginning of its budget process for the federal government’s new fiscal year in October. A successful policy-defining effort also might take advantage of the early “honeymoon” period with Congress. There is no guarantee of congressional receptiveness, but the president is better positioned to achieve success than later on: In year two of a presidency the mid-term congressional elections loom, potentially deflecting congressional concerns towards re-election and the folks back home;

later on, the presidential election is on the horizon, again potentially weakening the president's power position, especially if bipartisan support is needed.

External constraints also matter. Because of these, the Obama transition faced the most difficult and uncertain environment since Franklin D. Roosevelt took office in 1933. Economic conditions were grave: Financial institutions and the domestic auto industry on the verge of collapse, a stock market in its worst decline since the 1930s, growing budget deficits, and an economy headed toward the deepest and longest recession since World War II. Nor was foreign policy clear sailing. Although the war in Iraq was winding down, increased effort in Afghanistan appeared likely. The nuclear ambitions of Iran and North Korea still loomed. That all noted, how did Barack Obama and his team perform?

THE OBAMA PRE-ELECTION TRANSITION AND POLICY DEVELOPMENT

It is not entirely clear when Obama began to plan for a possible presidential transition. Some reports indicated that preliminary efforts began in the spring of 2008. But, at the very least, a formal effort was underway under the direction of John Podesta by the summer of 2008. Podesta had been the fourth and last chief of staff under Clinton and had directed the outgoing Clinton transition in 2000; he was thus someone knowledgeable about White House and personnel matters, as well as presidential transitions. He was a Democratic Party insider, and he understood Congress and the ways of Washington. In addition, as the founder and head of the Center for American Progress think tank, he could draw on a wealth of policy-related studies and an organized cadre of policy-informed associates. Many of the latter served in the transition and eventually in the new administration. His efforts were aided by the candidate's own recognition of the importance of early transition planning. According to Podesta, Obama "understood that in order to be successful he had to be ready. And he had to be ready fast" (Tumulty 2008, 27).

Notable were the lack of media reports of tension between the transition group and the Obama campaign staff. The latter had developed a reputation for internal order during the campaign, as well as strong interpersonal harmony and a rather cautious, "tight-lipped" relation with the media. So, too, on the transition side: Podesta "runs a tight ship," and he has calmed "rancor. . . by ensuring that people aren't free-lancing in the newspapers by anonymous quotes" (Crowley 2008, 27). No leaks to the media suggested any friction between the two groups. Nor would any have likely sat well with the candidate, who during the campaign had earned the nickname of "No-drama Obama" and a reputation for low tolerance of interpersonal competition, back-biting, or self-serving press leaks.

The lack of conflict is all the more remarkable given the rather robust pre-election effort that Podesta and his team were undertaking. In the Reagan, G. H. W. Bush, and G. W. Bush efforts—which are generally regarded as among the more successful of recent transitions—the pre-election period was largely devoted to preparing for the post-election transition; policy development and appointments were largely off the table before Election Day.² In fact, Podesta's

efforts were closer in scope to the more expansive operations run for Carter in 1976 and Clinton in 1992. But there was one crucial difference: They did not generate the friction and infighting with the campaign war rooms that negatively affected those earlier transitions, both before and after Election Day.

Potential nominees for key positions began to be considered, albeit discretely (Rucker 2008). The pre-election group also took a look at their predecessors' early successes and mistakes. Preliminary planning for the Obama administration's first 100 days was also undertaken. For this, Podesta's ready access to his own think tank proved important: "Much of its staff has been swept into planning for Obama's first 100 days in office," including a 26-page report detailing the day-to-day activities of an early Obama presidency (Connolly and Smith 2008). No pre-election effort in the past has had a director who could so easily and directly tap into such a policy and planning resource.

The need to hone down an array of campaign promises to a leaner presidential agenda especially was explored. In particular, addressing the declining economy through an economic stimulus package was raised, both as to substance and timing. These debates, one account noted shortly after Election Day, have "flavored the discussion among Mr. Obama's transition advisers *for months, even before his election.*" Should the policy focus be largely on the economy or include other agenda items? This too was explored: "The tension between these strategies has been a recurring theme in the memorandums prepared for him on various issues, advisers said" (Baker 2008, emphasis added).

Reviews of President Bush's executive orders, as well as other rules and regulations, were also undertaken: "The Obama transition team has identified executive orders he can sign in the first hours and days of his presidency to demonstrate action, even as the more ambitious promises take more time. Among other things, he can reverse a variety of Bush policies, like restrictions on abortion counseling [in foreign-aid programs abroad] and stem-cell research" (Baker 2008). According to another account, a team of some 50 people, mostly lawyers, "working for months in virtual solitude," compiled a list of approximately 200 regulatory actions and executive orders that could be rescinded, thereby positioning "the incoming president to move fast on high-priority items without waiting for Congress" (Connolly and Smith 2008).

An especially important step was the early selection of a White House chief of staff. Obama had begun thinking about Representative Rahm Emanuel (D-IL) for the position for a considerable time. As campaign adviser David Axelrod later recalled, "It was months before the election when Barack said to me, 'You know, Rahm would make a great chief of staff.' " Emanuel, "spent six years in the White House, knows this place inside and out, spent four or five years in Congress, and became a leader in a short period of time. He really understands the legislative process, he's a friend who the President has known for a long time from Chicago, and whose loyalty is beyond question, and who thinks like a Chicagoan" (Lizza 2009, 28). Two days after the election, Emanuel's appointment was announced. By contrast, it was not until December 12, 1992, that Clinton named his chief of staff, which delayed other White House appointments and the staff's role in developing the new administration's policy agenda.

POST-ELECTION: THE TRANSITION AND POLICY DEVELOPMENT

Pre-election work enabled the Obama transition to get off to a quick start. Podesta continued in his central role, but he was now assisted by two other co-directors, both from the Obama camp: Peter Rouse, Obama's Senate chief of staff, and Valerie Jarrett, a longtime confidante from Chicago. By November 12, teams were announced to continue work on the early policy initiatives of the Obama presidency.³ Groups were also assigned to bore into departments and agencies, with oversight provided by an eleven-person review group.

Walking a Fine Line

Obama's transition efforts benefited from close cooperation with the Bush team assigned to transition matters. Contact had been made with the pre-election teams of both presidential candidates over the summer. Briefing materials were ordered prepared in each agency and department. After the election, there were regular meetings between the key members of the incoming and outgoing administrations.

Economic policy obviously was of special concern. Space was provided in the Treasury Department for Obama aides to remain in close contact with department officials in dealing with the banking crisis and the economic downturn. However, efforts at the very top also mattered. Bush was prepared to take some presidential steps to make it a bit easier for his successor, such as requesting that Congress release the second half of the \$700 billion in bank bailout funds and agreeing to emergency funds of \$17.4 billion to avert the bankruptcy of General Motors and Chrysler. Reports also indicated that Obama and his economic advisers were working "closely with President Bush to inject confidence into the trembling financial markets The coordination between Mr. Obama and Mr. Bush was taking place among aides, as well as in direct talks about the rescue plan for Citigroup and unresolved details of the overall Treasury bailout plan." President Bush also told reporters that Obama would be informed of every "big decision" made, and that "It's important for the American people to know that there is close cooperation" (Zeleny 2008b).

Obama walked a fine line given the increasing magnitude of economic difficulties. He and his aides did not wish to follow FDR's path in the 1932 transition by distancing themselves too much from the ongoing crisis of the Great Depression, as FDR had done. At the same time, they recognized that they did not want to get closely yoked to Bush administration policies. Throughout the post-election period, Obama repeatedly emphasized that we have "only one president at a time," a posture which led him to decline to attend President Bush's global economic summit meeting on November 15 (Zeleny and Calmes 2008; Balz and Murray 2008). Yet he did not shy away from discussion of his own proposals for a stimulus package, aid to the automobile industry, or energy, environmental, and health care policies. He was also sometimes critical of the Bush administration's failure to deal with the declining housing market and mortgage foreclosure crises (Kornblut 2008).

Indeed, some of the economic issues were matters he pressed in his meeting with Bush. That the economy was suffering was becoming increasingly clear: data released only a few days after the election indicated that the unemployment rate had increased to 6.5 percent in October from 6.1 percent in September. It was but an early sign of increasing economic decline: by autumn 2009, the unemployment rate had risen to 10.2 percent.

Appointments, Policy, and Publicity

Starting on November 15—and for roughly a week after—the Obama transition began to announce key White House appointments. Emanuel's (and Podesta's earlier) efforts paid off: there would be no delay in the White House staff's role in the Obama policy agenda. Of particular note was the appointment of three individuals close to Obama—Axelrod, Rouse, and Jarrett—to newly defined positions: senior advisors to the president. The announcement events that Obama presided at served not only as occasions for the nominees to make brief remarks, but as points at which the president-elect took advantage of the occasion to emphasize his policy agenda and seize the “bully pulpit,” the one-president-at-a-time maxim notwithstanding.

The interwoven relationship of appointments, policy, and publicity was especially apparent as Obama then turned to his cabinet and other positions. Throughout the ensuing weeks, announcements were made in waves, with each wave designed to emphasize a particular area of policy concern. It was not the first time that this had been done (Reagan and Clinton had done so as well), but it was perhaps the most sustained and focused, and, at the time, seemingly successful.

The economic team came first, starting on November 24 and continuing over the next two days. Obama began with his principals: Timothy F. Geithner, president of the New York Federal Reserve, as treasury secretary; Lawrence Summers, former Clinton treasury secretary and former president of Harvard University, as director of the White House National Economic Council (NEC); and Berkeley economist Christina D. Romer as chair of the White House Council of Economic Advisers.

The group—which also included Melody Barnes, the new director of the White House's Domestic Policy Council—was unveiled at Obama's second news conference after the election. The president-elect also used the occasion to announce that he and his economic team would begin work immediately to put together a stimulus package to “jolt” the economy out of a “vicious cycle” affecting both Wall Street and Main Street; reports indicated the proposed package would be in the \$700 billion range. By including Barnes's appointment, Obama sought to link economic issues with domestic policy: “We know that rebuilding our economy will require action on a wide array of policy matters—from education and health care to energy and Social Security. Without sound policies in these areas, we can neither enjoy sustained economic growth nor realize our full potential as a people” (Fletcher 2008). Those domestic areas foreshadowed items that would appear in his first budget proposal presented in late February. They also indicated that he would pursue an ambitious policy agenda, not simply a focus on economic issues.

The rollout continued the next day: Peter R. Orszag, director of the Congressional Budget Office, was tapped as director of the Office of Management and Budget (OMB), with Rob Nabors as his deputy. The third day of emphasis on the economy centered on the announcement of a new President's Economic Recovery Advisory Board (PERAB, which was modeled after the President's Foreign Intelligence Advisory Board created by President Eisenhower in 1956) to be chaired by former Federal Reserve chairman Paul Volcker.

The next week, foreign policy was emphasized: Senator Hillary Clinton (D-NY) at State; the continuation of Defense Secretary Robert Gates at the Pentagon; General James L. Jones as NSC advisor; Governor Janet Napolitano of Arizona at Homeland Security; Eric Holder as Attorney General; and longtime Obama foreign policy adviser Susan Rice as UN ambassador. The group included three women and two African Americans: an opportunity to emphasize diversity was not ignored.

Other cabinet appointments quickly followed.⁴ By December 19, selection of the cabinet at least *appeared* to be complete. No recent transition, since Nixon's in 1968, had made swifter progress in filling out the cabinet. According to data compiled by Prof. Terry Sullivan, five of the 15 cabinet appointments were the earliest on record starting with the Carter transition in 1976 (White House Transition Project 2009a). A number of cabinet nominees, however, ran into difficulty as the confirmation process moved forward.⁵ Replacements were eventually found, although the appointment of subcabinet members was delayed a bit and attention was periodically deflected away from the early Obama policy agenda.

White House staff appointments also set records. The White House Transition Project found that of 13 top staff positions, seven appointments were announced at an earlier point than in any transition going back to Carter in 1976 (White House Transition Project 2009a). The importance of having a White House staff quickly in place cannot be underestimated. Only a handful of positions require Senate confirmation (some 26 slots in various Executive Office of the President's units created statutorily—but not jobs in what we generally think of as the “West Wing,” such as NSC advisor, chief of staff, or other members of the White House Office). Given the delay in filling subcabinet positions, the White House staff usually serves as the incubator of early policy initiatives and is the primary agent in making sure a new administration “hits the ground running” in its policy initiatives. Almost immediately, for example, the members of the White House economic team (plus Geithner, the only treasury official yet named) were at work on the stimulus plan, and key meetings with Obama were held in mid-December (Wilson 2009). In addition, over the early months of the new administration, White House “czars” were designated to lead key policy initiatives, eventually more than 30 such positions by some counts.

Congress: Building Bridges?

The transition also served as a time to meet with members of Congress, with the aim of building support for the new administration's political agenda. Two days after the election, reports indicted that Obama and chief of staff-designate

Emanuel were working with Democratic congressional leaders on a stimulus package. According to one account, they were working “behind the scenes” on a plan that included “more jobless benefits, food stamps, aid to financially strapped states and cities, and spending for infrastructure projects that keep people at work” (Zeleny and Calmes 2008). Elements of the plan largely matched the stimulus package that would pass Congress on February 13. Other policy areas of prime discussion were the bailout of the auto industry and expansion of the children’s health insurance program, which President Bush vetoed twice (Hulse and Herszenhorn 2008).

Republicans in Congress were also approached; despite increased Democratic majorities in both the House and the Senate, reaching out to the opposition and building bridges was pursued. Obama met with rival Senator John McCain (R-AZ) on November 17. Obama then made calls to Republican leaders, and he instructed Emanuel to meet with them on Capitol Hill. In January, Emanuel and NEC director Summers met privately with Senate Republicans on a number of occasions to discuss economic recovery plans and freeing the remaining \$350 billion in the bank bailout fund. According to one account of these efforts, “Some Republicans say they hear more than they ever did from the Bush administration” (Hulse 2009). Would this courtship yield sufficient votes for passage of the Obama agenda? One advantage the Obama camp had was that—in addition to Obama’s, Vice President Joe Biden’s, and Emanuel’s own service in Congress—a significant number of transition members had served on congressional staffs. So, too, had many members of the Obama White House staff (see: Burke 2009, 587).

OBAMA IN OFFICE: A ROBUST POLICY AGENDA

The work undertaken by the Obama transition—both before and after Election Day—paid off. Within two weeks of taking office, the president issued a number of executive orders rescinding Bush’s orders and putting new ones in place. Most notable of later efforts was a March 9 order lifting a ban on federal funding for most types of stem-cell research.

As for legislative efforts—attempts to reach across the aisle during the transition notwithstanding—Obama’s relationship with Republicans in Congress was not noticeably different from that of his predecessors’ dealings with members of the opposite party on the Hill: normal—if at times divisive—partisanship. His early executive orders permitting states to toughen auto-emissions standards, allowing federal funding for abortion-providers overseas, and, initially, proposing closure of the Guantanamo Bay detainee camp abroad drew Republican fire. Bipartisanship proved elusive.

EARLY SUCCESSSES

There were some early successes. Two were leftovers from the Bush presidency. In late January, President Obama signed the “Lilly Ledbetter Act”; expanded the time for employees to sue for various types of work-based discrimination. The bill had been blocked by Senate Republicans the previous

spring, but the increased Democratic majority led to passage in the new 111th Congress (the vote was 250-177 in the House and 61-36 in the Senate). On February 4, the president signed legislation renewing and expanding the State Children's Health Insurance Program (SCHIP), which had been vetoed twice by President Bush; the legislation added an additional 4 million children to the program. Forty House Republicans voted in favor, and the margin in the Senate was 66 to 32. The administration attracted some bipartisan support on both measures, but that was not to last.

Given the dire state of the economy and rising projections of budget deficits, Obama's team was divided about how and whether they should pursue a robust or more economy-focused policy agenda. Some favored emulating FDR's expansive approach in 1933,⁶ others were more cautious and drew lessons from the failed health-care initiative during the early Clinton presidency. But over time there were signs that, although not fully following the FDR model and putting everything immediately on the front burner, the new administration was planning steps for major policy initiatives during the first year. The price, however, was bipartisanship, and Republicans quickly and vociferously distanced themselves from the administration's proposals.

Early Proposals

The most important early legislation initiative was the White House's economic stimulus plan. Obama actively lobbied for bipartisan support, but in the end it was a Democratic initiative. A \$787 billion package bill finally passed both chambers of Congress on February 13; in a highly partisan vote no House Republicans, and only three Senate Republicans, supported it. It aimed to create millions of jobs through spending on transportation and other infrastructure projects, energy, health-care, and education spending. But was it an effort best designed to stimulate the economy? Was it the "best bang for the buck"?

The second major initiative was funding for the remainder of FY 2009. Continuing congressional resolutions had been in place since October; no agreement could be reached between the Bush White House and the Democratic-controlled Congress. In 2009, the new congressional proposal especially drew criticism as it contained more than 8,500 "earmarked" projects. Although Obama had urged restraint on pet bills, he signed what he called "imperfect" legislation on March 11. The legislation's effects—plus those of the bank bailout and the stimulus plan—on federal deficits were staggering. In FY 2007, the deficit was \$162 billion, in FY 2008 \$458 billion, and in FY 2009 \$1.8 trillion, if not more. Still, economic circumstances were severe, and federal spending may prove wise in the end.

A third early initiative was the president's own budget proposal for FY 2010, presented in a televised address to a joint session of Congress on February 26. The plan included \$150 billion in new energy projects; new environmental policies directed at global warming, especially a "cap-and-trade" system on carbon emissions; expansion of grants for college students; and a major, 10-year, \$634 billion initiative (by summer 2009, the price-tag would rise to nearly \$900 billion, if not more) to extend health-care coverage on a universal

basis. On the revenue side, the plan proposed a variety of tax increases and changes in itemized deduction rules for the top 5 percent of taxpayers, as well as letting the Bush tax cuts lapse. The White House resisted, however, even more expansive steps, such as House Speaker Nancy Pelosi's (D-CA) hope for immediately rescinding the Bush tax cuts on the wealthy rather than waiting for them to lapse. Still, it was an ambitious policy agenda, wrapped in an omnibus budget and tax plan, and with a projected deficit of \$1.2 trillion, if not more. A preliminary budget reconciliation vote—close to the administration's request but divided along party lines—passed both houses of Congress in early April.

An Agenda in Progress

Obama and his advisers chose to roll the dice on an ambitious agenda, rather than just focusing on the economy. By the end of summer 2009, the fate of two major agenda items remained outstanding: a comprehensive health-care reform proposal and an environmental policy aimed at “cap and trade,” an ambitious system for limiting air pollutants. However, another key proposal to eliminate private ballot elections for union representation—relying instead on a signed “card check” in favor of unionization—proved too divisive and fell by the wayside. Time will tell whether the White House's health care and environmental proposals will reach fruition. Of particular note will be the fate of White House's strategy of letting Congress flesh out the details on health care reform while emphasizing broad parameters and goals rather than a White House-directed plan. But there were some important victories: The Obama administration successfully secured the appointment of federal appeals court judge Sonia Sotomayor to the U.S. Supreme Court without much controversy. She will serve as the first female Hispanic judge on the high court, replacing Associate Justice David Souter.

CONCLUSION

Unfocused laundry lists can get new presidents in trouble, as occurred for Carter in 1977; so too for the closely held health care reform plan offered by Clinton. More targeted and more transparent efforts seem smarter politics, especially if they take advantage of a president's initial popularity and honeymoon with Congress to press important initiatives that may be more difficult to achieve later on (even as early as 2010 when the midterm congressional elections loom). Time is rarely on a president's side. The economic crisis might have worked to the administration's advantage: demands for a response were pressing, in ways they might not have been later on. Moreover, as Rahm Emanuel observed shortly after the election, “Never allow a crisis to go to waste. They are opportunities to do big things” (Zeleny 2008a). The legislative success of the Obama policy agenda would be an important test for the early Obama presidency, including repercussions of the bank bail-out plan, health care reform, and “cap and trade” environmental policy.

Although not perfect, the Obama transition to office did reasonably well in laying the ground work for the Obama presidency. The pre-election effort

is especially notable. It not only put in place the necessary steps for organizing the post-election transition effectively, but it also undertook a robust effort to plan for his presidency. Both before and after Election Day, discipline prevailed; the infighting and media leaks that had plagued some earlier transitions were absent. The post-election transition moved quickly in appointing and organizing the White House staff; how its internal dynamics work out, however, remained to be seen. Vetting of some cabinet nominees was clearly problematic and contributed to delay in sub-cabinet appointments.

President Obama signaled his intention to make a clean break from the unpopular Bush presidency with his executive orders and early policy and budget proposals. At the same time, he sought to tamp down public expectations for quick results on the economy. Early—and ambitious—actions were taken, but as he cautioned in his inaugural address, “The challenges we face are real” and they “will not be met easily or in a short span of time.” His initial political capital seemed high.

But was the right course of action chosen? The decision was made to embrace a broad range of policy reforms, not just focus on the economy. Moreover, it was a controversial agenda. His early efforts to gain bipartisan support in Congress—much like those of his predecessors—seem largely for naught and forced the administration to rely on narrow partisan majorities. The question that remained was whether his political capital, both in Congress and with the public, would bring him legislative—and ultimately policy—success.

Good transition planning is propitious, but it offers no guarantees. Still, without it, political and policy disaster likely awaits. President Obama seemed to reside largely on the positive side of the equation. But whether his early efforts would result in success remained uncertain in the summer of 2009.

ENDNOTES

1. For a fuller analysis of the Obama transition, see Burke (2009). On the Carter through Clinton transitions, see Burke (2000); on the George W. Bush transition and early presidency, see Burke (2004).
2. Among the very few exceptions were James A. Baker’s selection as secretary of state in 1988 and Andrew Card Jr. as chief of staff for G. W. Bush in 2000.
3. On November 19, seven additional groups were announced.
4. December 3, New Mexico governor and former presidential candidate Bill Richardson at Commerce; December 7, Gen. Eric Shinseki, former Army Chief of Staff, at Veterans Affairs; December 11, former Sen. Tom Daschle at HHS; December 13, Shaun Donovan, New York City’s housing commissioner, at HUD; December 15, Steven Chu, a physicist at the University of California, at Energy, and Lisa Jackson, former New Jersey commissioner of environmental protection, at EPA; December 16, Arne Duncan, chief executive of Chicago public schools, at Education; December 17, Sen. Ken Salazar (D-CO) at Interior, and former Iowa Gov. Tom Vilsack at Agriculture; December 19, Rep. Ray LaHood (R-IL) at Transportation, Rep. Hilda Solis (D-CA) at Labor, and former Dallas mayor Ron Kirk as U.S. Trade Representative. The only two key positions that experienced some delay were Dennis Blair’s selection as director of National Intelligence and Leon Panetta’s as director of the CIA; both were announced on January 9.
5. Those withdrawing included Richardson at Commerce, Daschle at HHS, and Senator Judd Gregg’s (R-NH) as the initial replacement for Richardson. The loss of Daschle to the Obama team was especially costly in terms of its health care initiatives. Daschle had been selected

to head up a special White House unit in that policy area, and reports indicated he might be given an office in the White House as well as attend morning staff meetings. There were delays in naming sub-cabinet nominees, especially in the Treasury Department (for a fuller analysis, see Burke 2009, pp. 591–93). However, by the 100-day mark on April 29—according to data compiled by Terry Sullivan—221 nominations to Senate-confirmed positions had been announced (compared to 201 for G. W. Bush), 183 had been sent to the Senate (compared to 87 for Bush), and 67 had been confirmed, compared to 33 for Bush. Furthermore, Obama was ahead of G. H. W. Bush and Clinton (both with 45 confirmations) but behind Reagan’s record of 83 (White House Transition Project 2009b).

6. It is interesting to note, however, that some of FDR’s most important initiatives were enacted later in his first term—after his initial focus on the economic crisis—especially key components of the “Second New Deal” such as the Social Security Act, the National Labor Relations (Wagner) Act, and bills creating the Works Progress Administration and the National Youth Administration. FDR also benefited from increased Democratic majorities in Congress following the 1934 midterm elections.

REFERENCES

- Baker, Peter, 2008. “Obama Team Weighs What to Take on First,” *The New York Times*, November 9.
- Balz, Dan and Shailagh Murray, 2008. “President-Elect Meets the Press, Cautiously,” *The Washington Post*, November 8.
- Burke, John P., 2000. *Presidential Transitions: From Politics to Practice*, (Boulder: Lynne Rienner).
- . 2004. *Becoming President: The Bush Transition, 2000–2003*, (Boulder: Lynne Rienner).
- . 2009. “The Obama Transition: An Early Assessment,” *Presidential Studies Quarterly* 39 (September 2009): pp. 572–602.
- Connolly, Ceci and R. Jeffrey Smith, 2008. “Obama Positioned to Quickly Reverse Bush Actions,” *The Washington Post*, November 9.
- Crowley, Michael, 2008. “The Shadow President: How John Podesta Invented the Obama Administration,” *New Republic*, November 19, pp. 26–28.
- Fletcher, Michael A., 2008. “Domestic Adviser May Play Greater Role,” *The Washington Post*, November 25.
- Hulse, Carl, 2009. “Obama Team Makes Early Efforts to Show Willingness to Reach Out to Republicans,” *The New York Times*, January 20.
- Hulse, Carl and David M. Herszenhorn, 2008. “Obama Team and Congress Are Hoping to Have Bills Ready by Inauguration,” *The New York Times*, November 27.
- Kornblut, Anne E., 2008. “Obama Warns Economy Will ‘Get Worse,’” *The Washington Post*, December 8.
- Lizza, Ryan, 2009. “The Gatekeeper: Rahm Emanuel on the Job,” *The New Yorker*, March 2, pp. 24–29.
- Rucker, Philip, 2008. “Potential Obama Appointees Face Extensive Vetting,” *The Washington Post*, November 18.
- Tumulty, Karen, 2008. “Change: What It Looks Like,” *Time*, November 24, pp. 26–29.
- White House Transition Project, 2009a. “Transition Roundup: Cabinet Record; WH Staff Record,” www.whitehousetransitionproject.org (accessed March 1, 2009).
- . 2009b. Appointments Summary. www.whitehousetransitionproject.org (accessed April 8, 2009).
- Wilson, Scott, 2009. “Bruised by Stimulus Battle, Obama Changed His Approach to Washington,” *The Washington Post*, April 29.
- Zeleny, Jeff, 2008a. “Obama Weighs Quick Undoing of Bush Policy,” *The New York Times*, November 10.
- . 2008b. “Obama and Bush Working to Calm Volatile Market,” *The New York Times*, November 25.
- Zeleny, Jeff and Jackie Calmes, 2008. “Obama, Assembling Team, Turns to the Economy,” *The New York Times*, November 7.

Reading 31

Unilateral Powers: A Brief Overview

WILLIAM G. HOWELL

To advance their policy agenda, presidents have two options. They can submit proposals to Congress and hope that its members faithfully shepherd bills into laws; or they can exercise their unilateral powers—issuing such directives as executive orders, executive agreements, proclamations, national security directives, or memoranda—and thereby create policies that assume the weight of law without the formal endorsement of a sitting Congress. To pursue a unilateral strategy, of course, presidents must be able to justify their actions on some blend of statutory, treaty, or constitutional powers; and when they cannot, their only recourse is legislation. But given the ambiguity of Article II powers and the massive corpus of law that presidents can draw upon, as well as the well-documented travails of the legislative process, the appeal of unilateral powers is readily apparent.

Not surprisingly, almost all the trend lines point upward. During the first 150 years of the nation's history, treaties (which require Senate ratification) regularly outnumbered executive agreements (which do not); but during the last 50 years, presidents have signed roughly 10 executive agreements for every treaty that was submitted to Congress (Margolis 1986; Moe and Howell 1999b). With rising frequency, presidents are issuing national security directives (policies that are not even released for public review) to institute aspects of their policy agenda (Cooper 1997, 2002). Since Truman fatefully called the Korean War a "police action," modern presidents have launched literally hundreds of military actions without first securing a formal congressional authorization (Blechman and Kaplan 1978; Fisher 2004b). Though the total number of executive orders has declined, presidents issued almost four times as many "significant" orders in the second half of the 20th century as they did in the first (Howell 2003, 83). Using executive orders, department orders, and reorganizations plans, presidents have unilaterally created a majority of the administrative agencies listed in the *United States Government Manual* (Howell and Lewis 2002; Lewis 2003). These policy mechanisms, what is more, hardly exhaust the options available to presidents, who regularly invent new ones or redefine old ones in order to suit their own strategic interests.

The nation's recent experience under the last two presidential administrations makes the subject all the more timely. From the creation of military tribunals to try suspected "enemy combatants" to tactical decisions made in ongoing conflicts in Afghanistan and Iraq to the freezing of financial assets in U.S. banks with links to bin Laden and other terrorist networks to the reorganization of

intelligence gathering domestically and abroad, Bush has relied upon his unilateral powers in virtually all facets of his “war on terror.” And to the considerable consternation of congressional Democrats, Bush has issued numerous rules that relax environmental and industry regulations concerning such issues as the amount of allowable diesel engine exhaust, the number of hours that truck drivers can remain on the road without resting, and the logging of federal forests.

During his tenure, Bill Clinton also “perfected the art of go-alone governing.”¹ Though Republicans effectively undermined his 1993 health care initiative, Clinton subsequently managed to issue directives that established a patient’s bill of rights for federal employees, reformed health care programs’ appeals processes, and set new penalties for companies that deny health coverage to the poor and people with preexisting medical conditions. While his efforts to enact gun control legislation met mixed success, Clinton issued executive orders that banned various assault weapons and required trigger safety locks on new guns bought for federal law enforcement officials. Then, during the waning months of his presidency, Clinton extended federal protections to literally millions of acres of land in Nevada, California, Utah, Hawaii, and Arizona.

Nor are Bush and Clinton unique in this respect. Throughout the modern era, presidents have used their powers of unilateral action to intervene in a whole host of policy arenas. Examples abound: By creating the Fair Employment Practices Committee (and its subsequent incarnations) and desegregating the military in the 1940s and 1950s, presidents defined federal government involvement in civil rights decades before the 1964 and 1965 Civil Rights Acts; from the Peace Corps to the Bureau of Alcohol, Tobacco, and Firearms to the National Security Agency to the Food Safety and Inspection Service, presidents unilaterally have created some of the most important administrative agencies in the modern era; with Reagan’s executive order 12291 being the most striking example, presidents have issued a long string of directives aimed at improving their oversight of the federal bureaucracy; without any prior congressional authorization of support, recent presidents have launched military strikes against Grenada, Libya, Lebanon, Panama, Haiti, Bosnia, and Somalia. A defining feature of presidential power during the modern era, one might well argue, is a propensity, and a capacity, to go it alone.

POWER AND PERSUASION

What theoretical tools currently allow us to discern when presidents exercise their unilateral powers, and what influence they glean from doing so? For answers, scholars habitually turn to Richard Neustadt’s seminal book *Presidential Power*, originally published in 1960 and updated several times since. This book not only set an agenda for research on the American presidency, it structured the ways scholars conceived of presidential power in America’s own highly fragmented system of governance.

When thinking about presidents since FDR, Neustadt argues, “Weak remains the word with which to start” (Neustadt 1990, xix). The modern president is more clerk than leader, struggling to stay atop world events,

congressional dealings, media cycles, and dissension within his party, cabinet, and White House. Though held responsible for just about everything, the president controls almost nothing. Congress, after all, enacts laws and the bureaucracy implements them, placing the president at the peripheries of government action. The pursuit of his policy agenda is marked more by compromise than conviction; and his eventual success ultimately depends upon the willingness of others to do things that he cannot possibly accomplish on his own.

Neustadt identifies the basic dilemma facing all modern presidents: The public expects them to accomplish far more than their formal powers alone permit. This has been especially true since the New Deal when the federal government took charge of the nation's economy, commerce, and the social welfare of its citizens. Now, presidents must address almost every conceivable social and economic problem, from the proliferation of terrorist activities around the globe to the "assaults" on marriage posed by same-sex unions. Armed with little more than the powers to propose and veto legislation and recommend the appointment of bureaucrats and judges, however, modern presidents appear doomed to failure from the very beginning. As one recent treatise on presidential "greatness" describes it, "Modern presidents bask in the honors of the more formidable office that emerged from the New Deal, but they find themselves navigating a treacherous and lonely path, subject to a volatile political process that makes popular and enduring achievement unlikely" (Landy and Milkis 2000, 197).

If a president is to enjoy any measure of success, Neustadt counsels, he must master the art of persuasion. Indeed, for Neustadt, power and persuasion are synonymous. As George Edwards notes, "Perhaps the best known dictum regarding the American presidency is that 'presidential power is the power to persuade.' This wonderfully felicitous phrase captures the essence of Neustadt's argument in *Presidential Power* and provided scholars with a new orientation to the study of the presidency" (2004, 126). The ability to persuade, to convince other political actors that his interests are their own, defines political power and is the key to presidential success.² Power is about bargaining and negotiating; about convincing other political actors that the president's interests are their own; about brokering deals and trading promises; and about cajoling legislators, bureaucrats, and justices to do his bidding. The president wields influence when he manages to enhance his bargaining stature and build governing coalitions—and the principal way to accomplish as much, Neustadt claims, is to draw upon the bag of experiences, skills, and qualities that he brings to the office.³

The image of presidents striking out on their own to conduct a war on terrorism or revamp civil rights policies or reconstruct the federal bureaucracy contrasts sharply with scholarly literatures that equate executive power with persuasion and, consequently, places presidents at the fringes of the lawmaking process. Conducting a secretive war on terrorism, dismantling international treaties brokered by previous administrations, and performing end runs around some of the most important environmental laws enacted during the past half-century, Bush has not stood idly by while committee chairs debated whether to introduce legislation on his behalf. Instead, in each instance he

has seized the initiative, he has acted boldly (some would say irresponsibly, or even unconstitutionally), and then he has dared his political adversaries to counter. Having issued a directive, Bush sought not so much to invigorate Congress's support as to neutralize its criticism. An inept and enervated opponent, rather than a cooperative and eager ally, seemed to contribute most to this president's powers of unilateral action.

The actions that Bush and his modern predecessors have taken by fiat do not fit easily within a theoretical framework of executive power that emphasizes weakness and dependence, and offers as recourse only persuasion. For at least two reasons, the ability to act unilaterally is conceptually distinct from the array of powers presidents rely upon within a bargaining framework. First, when presidents act unilaterally, they move policy first and thereby place upon Congress and the courts the burden of revising a new political landscape. If they choose not to retaliate, either by passing a law or ruling against the president, then the president's order stands. Only by taking (or credibly threatening to take) positive action can either adjoining institution limit the president's unilateral powers. Second, when the president acts unilaterally, he acts alone. Now of course, he relies upon numerous advisers to formulate the policy, to devise ways of protecting it against congressional or judicial encroachment, and to oversee its implementation (more on this below). But in order to issue the actual policy, the president need not rally majorities, compromise with adversaries, or wait for some interest group to bring a case to court. The president, instead, can strike out on his own. Doing so, the modern president is in a unique position to lead, to break through the stasis that pervades the federal government, and to impose his will in new areas of governance.

The ability to move first and act alone, then, distinguishes unilateral actions from other sources of influence. Indeed, the central precepts of Neustadt's argument are turned upside down, for unilateral action is the virtual antithesis of persuasion. Here, presidents just act; their power does not hinge upon their capacity to "convince [political actors] that what the White House wants of them is what they ought to do for their sake and for their authority" (Neustadt 1990, 30). To make policy, presidents need not secure the formal consent of Congress. Instead, presidents simply set public policy and dare others to counter. And as long as Congress lacks the votes (usually two-thirds of both chambers) to overturn him, the president can be confident that his policy will stand.

INSTITUTIONAL CONSTRAINTS ON PRESIDENTIAL POWER

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright.⁴ Even in those moments when presidential power reaches its zenith—namely, during times of national

crisis—judicial and congressional prerogatives may be asserted (Howell and Pevehouse 2005, forthcoming; Kriner, forthcoming; Lindsay 1995, 2003). In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by the president,⁵ as well as noncitizens held in protective custody abroad.⁶ And while Congress, as of this writing, continued to authorize as much funding for the Iraq occupation as Bush requested, members have imposed increasing numbers of restrictions on how the money is to be spent.

Though we occasionally witness adjoining branches of government rising up and then striking down presidential orders, the deeper effects of judicial and congressional restraints remain hidden. Bush might like to unilaterally institute a ban on same-sex marriages, or to extend additional tax relief to citizens, or to begin the process of privatizing aspects of Social Security accounts, but he lacks the constitutional and statutory basis for taking such actions, and he therefore prudently relents.⁷ And so it is with all presidents. Unilaterally, they do as much as they think they can get away with. But in those instances when a unilateral directive can be expected to spark some kind of congressional or judicial reprisal, presidents will proceed with caution; knowing that their orders will promptly be overturned, presidents usually will not act at all.

Elsewhere, I survey the historical record on legislative and judicial efforts to amend and overturn executive orders issued by presidents (Howell 2003, Chapters 5 and 6). On the whole, Congress has had a difficult time enacting laws that amend or overturn orders issued by presidents, though efforts to either codify in law or fund an executive order enjoy markedly higher success rates; while judges and justices have appeared willing to strike down executive orders, the vast majority are never challenged, and for those that are, presidents win more than 80 percent of the cases that actually go to trial.

Information and Foreign Policy

In foreign affairs, the president enjoys important informational advantages. This is especially true in matters involving the use of force, when a massive network of national security advisers, an entire intelligence community, and diplomats and ambassadors stationed all over the globe report more or less directly to the president, and when nothing comparable supports members of Congress. Instead, members must rely on the president and those within his administration to share information that might bear upon contemporary foreign-policy debates. To deal with the fact that presidents are not always forthcoming, Congress has established a variety of oversight procedures, a complex rule-making process, and liaison offices throughout the federal bureaucracy (Kiewiet and McCubbins 1991; McCubbins and Schwartz 1984). But a more basic problem often goes unnoticed: the issuance of unilateral directives without Congress knowing, or without its membership finding out until it is too late to craft an effective response. Such sorts of informational breakdowns, plainly, corrode congressional checks on presidential power; so as to mitigate these specific effects, over the past century, Congress has enacted several important laws.

Before Franklin Roosevelt's first term, Congress could not take for granted that presidents would publicly release the contents of their policy directives. Though they issued literally thousands of executive orders, proclamations, rules, and regulations, presidents were not required to publish them, and no central clearinghouse existed for lawmakers to review them. With the growth of the federal government came considerable confusion, as legislative enactments conflicted with unilateral directives, as judges and bureaucrats wondered what the law of the day was, and as different departments within the executive branch struggled to keep track of each other's doings. Recognizing that the "number and importance of administrative regulations [had] enormously increased," and that no system was in place to classify or catalogue them, Harvard Law Professor E. N. Griswold warned that the very principles of limited government and checks and balances were imperiled. "It might well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men 'for disobedience to laws or orders which he had kept them from the knowledge of' " (1934, 213). To correct this state of affairs, in 1935 Congress enacted the Federal Register Act, which required the Government Printing Office in collaboration with the National Archives to publish all executive orders, proclamations, agency rules, and regulations; later, notices and proposed rules were added to the list. The act typically is understood as a pragmatic solution to a growing administrative problem—and for obvious reasons, given the pervasive inefficiencies that then existed. But the act also had important consequences for the workings of the nation's system of separated powers. For by promptly publishing and cataloging various kinds of unilateral directives, the act at last established a system for members of Congress to oversee, and hence to check, presidential policy making.

Almost 40 years later, Congress revisited these issues, this time addressing the issuance of executive agreements. As the Federal Register Act does not require presidents to publish accords reached with foreign countries, Congress often was left in the dark about new trade or security agreements brokered by the president.⁸ During the 1950s and 1960s, for example, the Eisenhower, Kennedy, and Johnson administrations negotiated a series of executive agreements with the government of South Vietnam, but Congress did not learn of their existence until Nixon assumed office. Thus, in 1972, Congress passed the Case Act, requiring presidents to report every "international agreement, other than a treaty" within 60 days. In 1977, and again in 1979, Congress passed additional legislation that reduced the reporting period to 20 days and expanded the scope of the act to include international agreements brokered by executive agencies and departments. Unlike executive orders and proclamations, however, executive agreements still do not have a uniform classification or numbering scheme, making it more difficult for politicians (not to mention scholars) to track them.

The 1973 War Powers Resolution, the most renowned of the three laws considered in this section, dealt with related problems associated with the use of military force. Requiring presidents to consult with Congress "in every possible instance" before introducing military forces into foreign hostilities, and then requiring that troops be withdrawn if Congress does not authorize the action within sixty or ninety days, the resolution attempted to limit the president's ability to

freely decide when, and for how long, troops would be sent abroad. Having to obtain congressional authorization, it was supposed, presidents would supply members of Congress with the information they so sorely lacked about the costs and benefits of military action. And should members disagree with the president's initial decision to enter into the conflict, they could then force him to withdraw.

Though the Federal Register Act, the Case Act, and the War Powers Resolution have helped Congress monitor the exercise of a president's unilateral powers, problems nonetheless persist. Presidents regularly ignore the War Powers reporting requirements (Fisher 2000, 2004b); they re-label "executive agreements" as "arrangements" or "accords" in order to circumvent the Case Act (Hall 1996, 267); and they declare executive privilege to conceal their efforts to construct and implement public policy (Fisher 2004a; Rozell 2002). Meanwhile, one of the most auspicious displays of executive secrecy continues unchecked: national security directives (sometimes called national security decision memoranda, national security decision directives, or presidential decision directives), which are kept confidential, making it virtually impossible for members of Congress to regulate them. In the past several decades, presidents have used national security directives to do such things as escalate the war in Vietnam, initiate support for the Nicaraguan contras in the 1980s, commission studies on the "Star Wars" missile defense system, direct the nation's efforts to combat the international drug trade, develop national policy on telecommunications security, and define the nation's relationship with the former Soviet Union.⁹ These particular actions, moreover, come at the behest of orders that have recently been declassified. Many more continue to come down the pipeline, though Congress, and the public, will have to wait some time to learn about them.

Obviously, to check executive power, legislators and judges must know what presidents have done, or what they plan to do. It is of considerable consequence, then, that for stretches of American history, presidents did not always inform members of Congress about their unilateral dealings. And still today, presidents continue to issue classified directives that often have far-reaching policy consequences. With a nontrivial amount of freedom to craft new kinds of unilateral directives, citing national security concerns and executive privilege as justifications for concealing their actions, presidents have obstructed the efforts of members of Congress to keep pace.

Getting on to the Agenda

Amid the congestion of interest groups and government expansion, political actors struggle to place on the public agenda the issues they care most about. Given the sheer number of problems that Congress now must cope with, and the limited amount of time and resources available to legislators, it can be difficult just to secure a hearing for one's chosen issue. To be sure, by going public, introducing their annual budget proposals, or leaning on key committee members, presidents have unique advantages, especially on issues of national importance. By holding a summit or announcing a policy initiative in the annual State of the Union address, presidents often succeed in launching public

deliberations on their legislative agendas. But on smaller matters, members of Congress can check presidential influence not so much by organizing and mobilizing coalitions in opposition, but rather by letting his proposals languish. Instead of taking the president head on and debating the merits of specific proposals, members simply preoccupy themselves with other policy matters. As a consequence, congressional inaction, often more than action, is occasionally the preferred response to White House entreaties, and the bane of a president banking his legacy on legislative victories.

Fortunately, from the president's perspective, unilateral directives provide a way out. For when presidents act unilaterally, they do not call into an expansive void, hoping that someone will respond. Quite the opposite, with the stroke of a pen, presidents instantly make gays in the military or arsenic in drinking water or military tribunals the news of the day. And if its members hope to affect the course of policy making, Congress had better spring to action, for an executive order retains the weight of law until, and unless, someone else overturns it. The strategy of ignoring the president is turned against Congress; the check on presidential power that complacency typically affords is instantly removed. Indeed, having issued a unilateral directive, presidents would just as soon pass unnoticed, for congressional inaction often is functionally equivalent to support.

By issuing a unilateral directive, however, presidents do more than capture the attention of members of Congress. They also reshape the nature of the discussions that ensue. The president's voice is not one of many trying to influence the decisions of legislators on committees or floors. The president, instead, stands front and center, for it is his order that motivates the subsequent debate. When members of Congress consider whether or not to fund a unilaterally created agency or to amend a newly issued order or to codify the president's action in law, discussions do not revolve lazily around a batch of hypotheticals and forecasts. Instead, they are imbued with the urgency of a world already changed; and they unavoidably center on all of the policy details that the president himself instituted. And because any policy change is difficult in a system of separated powers, especially one wherein transaction costs and multiple veto points line the legislative process, the president is much more likely to come out on top in the latter debates than in the former.

This fact is made abundantly clear when presidents consider sending troops abroad. Though Clinton faced a fair measure of opposition to his plans to intervene in Haiti and Bosnia—as Bush (41) did when he tried to make the case for invading Iraq, and as Reagan did when he considered action in Grenada—the terms of debate irrevocably changed the moment these presidents launched the military ventures. As soon as troops were put in harm's way, the exigencies of protecting American lives muted many of the reservations previously raised about military action. The domestic political world shifted the moment that presidents formally decided to engage an enemy. Though Congress retained important avenues of influence over the ongoing conduct of these military campaigns, opponents of the president, at least initially, were put on the defensive. By using force unilaterally, these presidents effectively remade the political universe, launching their policy initiatives toward the top of Congress's

agenda and ensuring that they received a considerably fairer hearing than they would have during the weeks and months that preceded the actions.

We must not overstate the point, of course. There are many policy areas in which presidents lack the constitutional or statutory authority to act unilaterally; in these instances, the president's only option is to engage the legislative process. Moreover, even when they retain the option of an administrative strategy, presidents cannot be sure that Congress will abstain from amending or overturning his actions. The basic point, however, remains: If inattention and disregard are effective means of checking executive power, unilateral directives instill subsequent discussions with a renewed sense of urgency and alter the terms of debate in ways that are more favorable to the president.

Budgets

If it has one, the power to appropriate money for unilaterally created programs is Congress's trump card. When a unilateral action requires funding, considerable influence shifts back to the legislative branch—for in these instances, a president's directive requires positive action by Congress. Whereas previously, presidents needed only to block congressional efforts to amend or overturn their orders—something more easily done, given the well-documented travails of the legislative process—now they must build and sustain the coalitions that often prove so elusive in collective decision-making bodies. And should they not secure it, orders written on paper may not translate into action taken on the ground.

For at least three reasons, however, the obligations of funding do not torpedo the president's unilateral powers. First, and most obviously, many unilateral actions that presidents take do not require additional appropriations. Bush's orders took immediate effect when he decided to include farm-raised salmon in federal counts under the Endangered Species Act, removing 23 of 27 salmon species from the list of endangered species and thereby opening vast tracks of lands to public development;¹⁰ when he issued rules that alter the amount of allowable diesel engine exhaust, that extend the number of hours that truck drivers can remain on the road without resting, and that permit Forest Service managers to approve logging in federal forests without standard environmental reviews;¹¹ and when he froze all financial assets in U.S. banks that were linked to bin Laden and other terrorist networks.¹² These orders were, to borrow Neustadt's term, "self-executing," and the appropriations process did not leave him open to additional scrutiny.

Second, the appropriations process is considerably more streamlined, and hence easier to navigate, than the legislative process. It has to be, for Congress must pass a continually expanding federal budget every year, something not possible were the support of supermajorities required. However, by lowering the bar to clear appropriations, Congress relaxes the check it places on the president's unilateral powers. There are a range of programs and agencies that lack the support of supermajorities that are required to create them but that have the support of the majorities needed to fund them. Just because the

president cannot convince Congress to enact a program or agency does not mean that he cannot build the coalitions required to fund them.

Third, and finally, given the size of the overall budget and the availability of discretionary funds, presidents occasionally find ways to secure funding for agencies and programs that even a majority of members of Congress oppose. Presidents may request moneys for popular initiatives and then, once secured, siphon off portions to more controversial programs and agencies that were unilaterally created. They can reprogram funds within budgetary accounts or, when Congress assents, they may even transfer funds between accounts. And they can draw from contingency accounts, set-asides for unforeseen disasters, and the like, in order to launch the operations of certain agencies that face considerable opposition within Congress. By Louis Fisher's account, "The opportunity for mischief is substantial" (1975, 88). While discretion is far from absolute, the president does have more flexibility in deciding how funds are spent than a strict understanding of Congress's appropriations powers might suggest.

As evidence of this last scenario, recall Kennedy's 1961 executive order creating the Peace Corps. For several years prior, Congress had considered, and rejected, the idea of creating an agency that would send volunteers abroad to perform public works. Republicans in Congress were not exactly thrilled with the idea of expending millions on a "juvenile experiment" whose principal purpose was to "help volunteers escape the draft"; Democrats refused to put the weight of their party behind the proposal to ensure its passage (Whitnah 1983). By unilaterally creating the Peace Corps in 1961, and then using contingency accounts to fund it during its first year, Kennedy managed to change all of this. For when Congress finally got around to considering whether or not to finance an already operational Peace Corps in 1962, the political landscape had changed dramatically—the program had almost 400 Washington employees and 600 volunteers at work in eight countries. Congress, then, was placed in the uncomfortable position of having to either continue funding projects it opposed, or eliminate personnel who had already been hired and facilities that had already been purchased. Not surprisingly, Congress stepped up and appropriated all the funds Kennedy requested.

These three caveats aside, the exigencies of funding recommend an important distinction. The president's powers of unilateral action are greatest when they do not require congressional appropriation. For when funding is required, inaction on the part of Congress can lead to the demise of a unilaterally created agency or program. And as a consequence, the president's power of unilateral action diminishes, just as congressional influence over the scope and operations of these agencies and programs expands.

SOME CONCLUDING THOUGHTS

Over the past several decades, the vast majority of quantitative work on presidential power has focused exclusively on the conditions under which presidents successfully guide their policy agenda through Congress. Whole literatures are

devoted to whether presidents are more successful in convincing Congress to enact their foreign-policy than their domestic-policy initiatives (see, e.g., Wildavsky 1966, 1989); to the influence that presidents garner from wielding a veto at the end of the legislative game (Cameron 1999; Cameron and McCarty 2004); to the effects that presidential appeals to the public have on legislative deliberations (Canes-Wrone 2005; Kernell 1997); and to the incentives that presidents have to politicize and centralize the crafting of legislative proposals (Rudalevige 2002). More than any other yardstick, scholars measure presidential power by reference to his variable success at coaxing legislative processes in directions and distances they would not otherwise traverse.

All of this work is vital; much more remains to be done. But if we are to account for the full range of powers that presidents exercise, we need a comparable literature that scrutinizes the conditions under which presidents issue unilateral directives and the influence that they glean from doing so. The legislative arena is hardly the only venue in which presidents exercise power. Increasingly, they pursue their policy agenda not through laws, but instead through some combination of executive orders, executive agreements, proclamations, memoranda, and other sorts of unilateral directives. And until we have a firm understanding of the trade-offs associated with administrative and legislative strategies, and we more fully document the regularity with which presidents pursue one versus the other, our understanding of presidential power will remain incomplete.

As we build this literature, scholars should keep two considerations in mind. First, the theory that was (and is) used to explain presidential success within Congress may not accurately explain presidential success outside of Congress. Theories of lawmaking and theories of unilateral action will likely generate different expectations about the conditions under which policy change occurs. For instance, two recent pivotal politics models suggest that Congress and the president will produce more laws when the preferences within and across the two respective branches are relatively cohesive, but as preferences disperse, opportunities to enact legislation typically decline (Brady and Volden 1998; Krehbiel 1998). As we have seen, however, the production of significant executive orders follows a very different logic. When members of Congress are unified and strong, unilateral activity declines; when gridlock reigns, presidents seize the opportunity to issue policies through unilateral directives that would not possibly survive the legislative process. This particular empirical finding should not come as a surprise, for unilateral power varies according to the legislative and judicial checks placed upon the president. When these checks weaken, unilateral power expands; when they strengthen, unilateral power declines. So doing, though, presidential influence through legislation would appear to increase at precisely those times when, and in those areas where, presidential influence through unilateral directives dissipates.

This leads to the second point concerning the construction of a literature on unilateral action. That theories (and tests) of presidential power must be embedded within larger theories (and tests) of systems of separated powers is well understood (see Jones 1994). Few scholars would now argue that we can understand the American presidency outside of the larger political system that

individual presidents inhabit. But when examining unilateral powers, the president's relationships with Congress and the courts shift in important ways. Specifically, when unilateral powers are exercised, legislators, judges, and executives do not work collectively to effect meaningful policy change, and opportunities for change do not depend upon the willingness and capacity of different branches of government to cooperate with one another. To the contrary, the system looks more like a system of pulleys and levers—as presidents issue unilateral directives, they struggle to protect the integrity of orders given and to undermine the efforts of adjoining branches of government to amend or overturn actions already taken. Rather than being a potential boon to presidential success, Congress and the courts represent threats. For presidents, the trick is to figure out when legislators and judges are likely to dismantle a unilateral action taken, when they are not, and then to seize upon those latter occasions to issue public policies that look quite different from those that would emerge in a purely legislative setting.

ENDNOTES

1. Francine Kiefer, "Clinton Perfects the Art of Go-Alone Governing," *Christian Science Monitor*, July 24, 1998, p. 3.
2. Neustadt certainly was not the only scholar to equate power with persuasion. Some seven years before Neustadt published his seminal tract on presidential power, Robert Dahl and Charles Lindbloom observed that "like everyone else in the American policy process, the president must bargain constantly—with Congressional leaders, individual Congressmen, his department heads, bureau chiefs, and leaders of nongovernmental organizations" (1953, 333).
3. A number of scholars have challenged this last claim, namely that power is personal and depends upon a president's reputation and prestige. For one of the more trenchant critiques, see Moe (1993).
4. Future presidents, too, can overturn the unilateral directives of their predecessors. Incoming presidents regularly relax, or altogether undo, the regulations and orders of past presidents; and in this respect, the influence a sitting president wields is limited by the anticipated actions of their successors. As Richard Waterman correctly notes, "Subsequent presidents can and often do . . . reverse executive orders. Clinton reversed abortion policy established via executive order by the Reagan and G. H. W. Bush administrations. G. W. Bush then reversed Clinton's orders on abortion. . . . This is not a constraint if we think only within administrations, but for presidents who wish to leave a long-term political legacy, the fact that the next president may reverse their policies may force them, at least on occasion, to move to the legislative arena" (2004, 245). The transfer and exchange of unilateral directives across administrations, however, is not always as seamless as all this supposes. Often, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation's credibility, or confronting serious, often insurmountable, legal obstacles (see Howell and Mayer in this volume).
5. *Hamdi v. Rumsfeld*, 03-6696, June 28, 2004; *Rumsfeld v. Padilla*, 03-1027, June 28, 2004.
6. *Bush v. Gherebi*, 03-1245, Ninth Circuit U.S. Court of Appeals, December 18, 2003. On June 30, 2004, the Supreme Court remanded the case back to the appellate level in light of the *Hamdi* and *Padilla* decisions.
7. For a discussion on the difficulties of constraining the president through crafting carefully worded statutes, see Moe and Howell (1999a, 1999b).
8. For more on the conditions under which presidents issue executive agreements versus treaties, see Lisa Martin's contribution to this volume.
9. The National Security Archive has recently assembled a sample of declassified national security directives issued by every president since Truman. See <http://nsarchive.chadwyck.com/pdintro.htm> (accessed January 6, 2005).
10. Timothy Egan, "Shift on Salmon Re-ignites Fight on Species Law," *The New York Times*, May 8, 2004, p. A1.

11. David Brinkley, "Out of Spotlight, Bush Overhauls U.S. Regulations," *The New York Times*, August 14, 2004, p. A1.
12. Carolyn Lochhead, "Bush Goes after Terrorists' Funds," *San Francisco Chronicle*, September 25, 2001, p. A1. Patrick Hoge, "U.S. List of Frozen Assets Gets Longer," *San Francisco Chronicle*, October 13, 2001, p. A8.

REFERENCES

- Blechman, Barry, and Stephen Kaplan. 1978. *Force without War: U.S. Armed Forces as a Political Instrument*. Washington, DC: Brookings Institution Press.
- Brady, David, and Craig Volden. 1998. *Revolving Gridlock: Politics and Policy from Carter to Clinton*. Boulder, CO: Westview Press.
- Cameron, Charles M. 1999. *Veto Bargaining: Presidents and the Politics of Negative Power*. New York: Cambridge University Press.
- Cameron, Charles, and Nolan M. McCarty. 2004. "Models of Vetoes and Veto Bargaining," *Annual Review of Political Science* 7: 409–35.
- Canes-Wrone, Brandice. 2005. *Who's Leading Whom?* Chicago: University of Chicago Press.
- Cash, Robert. 1963. "Presidential Power: Use and Enforcement of Executive Orders," *Notre Dame Lawyer* 39(1): 44–55.
- Cooper, Phillip. 1997. "Power Tools for an Effective and Responsible Presidency," *Administration & Society* 29(5): 529–56.
- . 2001. "Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games," *Presidential Studies Quarterly* 31(1): 126–41.
- . 2002. *By Order of the President: The Use and Abuse of Executive Direct Action*. Lawrence: University Press of Kansas.
- Dahl, Robert, and Charles Lindbloom. 1953. *Politics, Economics, and Welfare*. New York: Harper and Row.
- Deering, Christopher, and Forrest Maltzman. 1999. "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly* 52(4): 767–83.
- Edwards, George C. III. 2004. "In Memoriam: Richard E. Neustadt," *Political Science and Politics* 37(1): pp. 125–27.
- . ed. 2005. *Presidential Politics*. Belmont, CA: Wadsworth.
- Farris, Anne, Richard P. Nathan, and David J. Wright. 2004. *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*. Washington, DC: Roundtable on Religion and Social Policy.
- Fisher, Louis. 1975. *Presidential Spending Power*. Princeton, NJ: Princeton University Press.
- . 2000. *Congressional Abdication on War and Spending*. College Station: Texas A&M University Press.
- . 2004a. *The Politics of Executive Privilege*. Durham, NC: Carolina Academic Press.
- . 2004b. *Presidential War Power*. 2nd ed. Lawrence: University of Kansas Press.
- Fleishman, Joel, and Arthur Aufses. 1976. "Law and Orders: The Problem of Presidential Legislation," *Law and Contemporary Problems* 40(Summer): 1–45.
- Griswold, E. N. 1934. "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation," *Harvard Law Review* 48(2): 198–215.
- Hall, Richard. 1996. *Participation in Congress*. New Haven, CT: Yale University Press.
- Hebe, William. 1972. "Executive Orders and the Development of Presidential Powers," *Villanova Law Review* 17(March): pp. 688–712.
- Howell, William G. 2003. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton, NJ: Princeton University Press.
- Howell, William, and David Lewis. 2002. "Agencies by Presidential Design," *Journal of Politics* 64(4): pp. 1095–114.
- Howell, William, and Jon Pevehouse. 2005. "Presidents, Congress, and the Use of Force," *International Organization* 59(1): pp. 209–32.
- . Forthcoming. *While Dangers Gather: Congressional Checks On Presidential War Powers*. Princeton, NJ: Princeton University Press.

- Huber, John, and Charles Shipan. 2002. *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy*. New York: Cambridge University Press.
- Jones, Charles. 1994. *The Presidency in a Separated System*. Washington, DC: Brookings Institution Press.
- Kernell, Samuel. 1997. *Going Public: New Strategies of Presidential Leadership*. Washington, DC: Congressional Quarterly Press.
- Kiewiet, Roderick, and Mathew McCubbins. 1991. *The Logic of Delegation*. Chicago: University of Chicago Press.
- Krause, George, and David Cohen. 1997. "Presidential Use of Executive Orders, 1953–1994," *American Politics Quarterly* 25(October): pp. 458–81.
- Krause, George, and Jeffrey Cohen. 2000. "Opportunity, Constraints, and the Development of the Institutional Presidency: The Case of Executive Order Issuance, 1939–1996," *Journal of Politics* 62(February): pp. 88–114.
- Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.
- Kriner, Douglas. Forthcoming. "Hollow Rhetoric or Hidden Influence: Domestic Constraints on the Presidential use of Force," Ph.D. diss., Department of Government, Harvard University, Cambridge, MA.
- Landy, Marc, and Sidney Milkis. 2000. *Presidential Greatness*. Lawrence: University of Kansas Press.
- Lewis, David E. 2003. *Presidents and the Politics of Agency Design*. Stanford, CA: Stanford University Press.
- Lindsay, James M. 1995. "Congress and the Use of Force in the Post-Cold War Era," In *The United States and the Use of Force in the Post-Cold War Era*, edited by T. A. S. Group. Queenstown, MD: Aspen Institute.
- . 2003. "Deference and Defiance: The Shifting Rhythms of Executive-Legislative Relations in Foreign Policy," *Presidential Studies Quarterly* 33(3): pp. 530–46.
- Margolis, Lawrence. 1986. *Executive Agreements and Presidential Power in Foreign Policy*. New York: Praeger.
- Mayer, Kenneth. 1999. "Executive Orders and Presidential Power," *Journal of Politics* 61(2): pp. 445–66.
- . 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton, NJ: Princeton University Press.
- Mayer, Kenneth, and Kevin Price. 2002. "Unilateral Presidential Powers: Significant Executive Orders, 1949–99," *Presidential Studies Quarterly* 32(2): pp. 367–86.
- Mayer, Kenneth, and Thomas Weko. 2000. "The Institutionalization of Power," In *Presidential Power: Forging the Presidency for the Twenty-First Century*, edited by R. Shapiro, M. Kumar, and L. Jacobs. New York: Columbia University Press.
- McCubbins, Mathew, and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28(1): pp. 165–79.
- Moe, Terry. 1990. "The Politics of Structural Choice: Toward a Theory of Public Bureaucracy," In *Organization Theory: From Chester Barnard to the Present and Beyond*, edited by Oliver Williamson. New York: Oxford University Press.
- . 1993. "Presidents, Institutions, and Theory," In *Researching the Presidency: Vital Questions, New Approaches*, edited by G. Edwards, J. Kessel, and B. Rockman. Pittsburgh, PA: University of Pittsburgh Press.
- . 1999. "The Presidency and the Bureaucracy: The Presidential Advantage," In *The Presidency and the Political System*, edited by M. Nelson. Washington, DC: Congressional Quarterly Press.
- Moe, Terry, and William Howell. 1999a. "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29(4): pp. 850–72.
- . 1999b. "The Presidential Power of Unilateral Action," *Journal of Law, Economics, and Organization* 15(1): pp. 132–79.
- Moe, Terry M., and Scott A. Wilson. 1994. "Presidents and the Politics of Structure," *Law and Contemporary Problems* 57(2): pp. 1–44.

- Morgan, Ruth P. 1970. *The President and Civil Rights: Policy Making by Executive Order*. New York: St. Martin's Press.
- Neustadt, Richard E. 1990. *Presidential Power and the Modern Presidents*. New York: Free Press.
- Rockman, Bert, and Richard W. Waterman, eds. Forthcoming. *Presidential Leadership: The Vortex of Power*. Los Angeles: Roxbury Press.
- Rozell, Mark. 2002. *Executive Privilege: Presidential Power, Secrecy, and Accountability*. Lawrence: University of Kansas Press.
- Rudalevige, Andrew. 2002. *Managing the President's Program: Presidential Leadership and Legislative Policy Formation*. Princeton, NJ: Princeton University Press.
- Waterman, Richard W. 2004. "Unilateral Politics," *Public Administration Review* 64(2): pp. 243–45.
- Whitnah, Donald R. 1983. *Government Agencies*. Westport, CT: Greenwood Press.
- Wildavsky, Aaron. 1966. "The Two Presidencies," *Trans-Action* 4(December): pp. 7–14.
- . 1989. "The Two Presidencies Thesis Revisited at a Time of Political Dissensus," *Society* 26(5): pp. 53–59.

Reading 32

Prerogative Power and the War on Terrorism

RICHARD PIOUS

"We will protect America," Bush promised the American people after the 9/11 attacks, "But we will do so within the guidelines of the Constitution . . . the American people got to understand that the Constitution is sacred as far as I'm concerned."¹ Bush had at times taken a different stance, signaling a curtailment of civil liberties: "The enemy has declared war on us," he said, "and we must not let foreign enemies use the forums of liberty to destroy liberty itself."² Several years later George Tenet, the director of the CIA, wrote a memoir in which he defended extreme interrogation measures, claiming they had been required to gain information to protect the American people.³ Does the Bush administration's response to terrorism mean that we are moving down a slippery slope that is eroding due process of law and international norms of human rights? Or is it a response consistent with historical precedents and the Constitution?

PRESIDENTIAL PREROGATIVE

President Bush's administration had a choice of two approaches in dealing with the terrorist threats; one emphasized gathering intelligence in a "war" on terror, and the other viewed apprehending terrorists as an issue of international cooperation in police work, and would require adherence to due process of law.

The Intelligence Model

The “intelligence” model focuses on the enormity of the potential damage from weapons of mass destruction, the possibility of cyber-warfare against the infrastructure that controls physical or information systems, and the potential for martyrdom acts that can instill terror in the population.⁴ Terrorism can lead to panic, with a “third day” scenario in which Americans would be stampeding out of cities, or away from nuclear reactors, so that the impact of a single act committed by a handful of terrorists—or even one—could be leveraged. Networks of operatives are loosely linked and dispersed throughout the world, making it difficult to monitor them. Weapons from the arsenals of the laboratories and stockpiles of the former Soviet Union may be stolen or sold to terrorists. American borders are porous, and people and weapons are likely to make it through. Threats of reprisal are meaningless and deterrent factors limited.⁵

The intelligence model (the television program 24 is based on it) seeks to limit those advantages through enhanced surveillance, infiltration by use of double-agents, early and preemptive detention, and aggressive interrogation, all designed to find the operatives who are planning new attacks and disrupt their plans. Trying conspirators or perpetrators is not nearly as important as preventing catastrophic events. What counts is to apprehend them before the next act of terrorism and obtain information from them.

The Due Process Model

The due process model starts with the premise that when a person (whether a citizen or not) is under surveillance or an investigation focuses on a suspect, that person must be accorded constitutional and legal rights of due process. These will be extensive for ordinary criminal suspects and involve the right to know the charges, to have the privilege of the writ of *habeas corpus* (the right to have a magistrate determine if the arrest and conditions of detention were lawful), the right to counsel, the right to question witnesses, the right to introduce evidence, the right to a trial, and the right of appeal. For aliens apprehended abroad, rights may be limited, but everyone must be dealt with according to the rule of law.

The False Dichotomy

Critics argue that the due process model fails to protect Americans, and that other approaches must be substituted, because the potential costs of terrorist actions are so catastrophic—including the doomsday use of nuclear weapons.⁶ They argue that once weapons of mass destruction can be employed, prior calculations about the price society must pay to ensure the rights of the accused are outmoded.

Richard Posner, a distinguished jurist and legal scholar, has argued, “The safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation’s safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty.”⁷ Posner argues that all that can reasonably

be asked in considering the constitutionality of government action is that we weigh the costs as well as benefits in curtailing liberties.

Yet the “balancing” test may well be wrongheaded. Sometimes there may be a trade-off situation in which one must give up some of one thing of value in order to attain some of another; but sometimes the balance does not work, because the approach taken provides less of both valued things. In fighting terrorism, we want the best combination of guarantees of due process of law that protect our personal freedom and our privacy, and of strong government action that protects national security and our own personal security.⁸

Civil libertarians argue that protection of due process rights is *necessary* to maximize intelligence about terrorism. First, unless surveillance is targeted to the most likely threats, it wastes resources. If judges are required to approve surveillance requests, it is likely the government will concentrate its efforts on those searches most likely to produce results. Second, interrogations conducted with brutality or use of torture are likely to result in misleading information because detainees so treated will say anything. Third, the adversarial system produces better information than the interrogation system. A prisoner’s counsel will develop a case, gather documentation, and organize testimony. Counsel may advise a client to plead to a lesser crime, turn state’s evidence, and cooperate for leniency—cooperation the government cannot force with brutality. Above all else, due process of law protects the innocent, and when innocent people are set free, the government no longer diverts resources to combat non-existent terrorist threats based on calculations of the *modus operandi* of those who had been suspects. Fourth, intelligence leads come from informers and with the cooperation of civic leaders, and this cooperation is more likely to be achieved under the rule of law than through brutalizing the population.

Bush’s Choice

The Bush administration chose to employ the intelligence model in dealing with terrorists. To do so the government would go beyond the customary interpretations of international law, constitutional provisions, statutes, and existing military regulations, all of which were based on adherence to the due process model.⁹ President Bush would issue executive and military orders based on his constitutional prerogatives (as he defined them) to authorize aggressive gathering of intelligence through expanded electronic surveillance not subject to judicial warrant, and through the mistreatment of detainees; to hold detainees indefinitely and punish them, the federal courts and military courts martial would be supplanted by military tribunals.

Surveillance Authority

In the immediate aftermath of 9/11, President Bush authorized by a secret executive order the National Security Agency (NSA) to target calls made in or out of the U.S. when one party was abroad and there might be a link to al Qaeda, and to do so without obtaining a judicial warrant from the Foreign Intelligence

Surveillance Court, as the Foreign Intelligence Surveillance Act (FISA) required. The administration briefed selected congressional leaders more than a dozen times, but swore them to secrecy and refused to let them consult with outside counsel on the legality of the program. Under another program, Verizon, Bell South, and AT&T allowed the NSA to conduct surveillance on domestic calls and e-mails without warrants. This program was in violation of section 222 of the Communications Act of 1934, which prohibits phone companies from giving out information about their customers' calls. Two years later, Attorney General John Ashcroft and other senior officials threatened to resign, believing the way the program was administered by NSA was illegal. President Bush intervened and reauthorized the program without Justice's concurrence, and then made modifications (still classified) that averted the resignations.

Status of Enemy Combatants

President Bush asserted a prerogative power to reinterpret existing international obligations in order to detain indefinitely prisoners captured in Afghanistan and elsewhere and to mistreat them in order to obtain information. He applied the Geneva Conventions to Taliban prisoners captured in Afghanistan but not to al Qaeda detainees (because al Qaeda is not a sovereign state and is not a party to the conventions), but determined that neither group would be granted prisoner-of-war status, and both would be considered "unlawful combatants." Under the Geneva Conventions, lawful combatants are granted significant due process guarantees, and they are entitled to defense by a qualified advocate or counsel of their own choice (Article 105), right of appeal of conviction to civilian courts (Article 106), and right to the same sentences as U.S. personnel, which would limit the death penalty (Article 87).¹⁰ But unlawful combatants are treated differently: Their status is supposed to be determined, according to the Geneva Conventions, by a competent tribunal: President Bush, without using the civilian courts or military courts, made the determination unilaterally for a whole class of detainees, thus acting as the "competent tribunal" himself. Unlawful combatants are granted some due process rights, set forth in the First Additional Protocol to the Geneva Conventions.¹¹ But the United States is not a signatory to that convention; thus, the Afghan and Guantanamo Bay prisoners were granted no rights at all; their treatment depended completely on the sufferance of military authorities.

Indefinite Detention of Unlawful Combatants

Under international law, the United States has the right to detain and to try unlawful combatants for violations of the laws of war (battlefield atrocities), violations of humanitarian law (genocide), or violations of criminal law (airplane hijacking and murder). Some of the unlawful combatants were sent to a newly constructed prison facility (Camp X-Ray, later Camp Delta) at the Guantanamo Bay Naval Station in Cuba.¹²

American citizens were not brought to Guantanamo, but some were placed in solitary confinement and indefinite detention in military facilities in the

United States. In the past, citizens had been subject to military detention and trial in military courts only when martial law had been proclaimed and when the military had occupied territory in secession or rebellion. They also had been subject to military justice, if they had been enemy combatants during hostilities and had violated the laws of war. In *Ex Parte Quirin*, involving German saboteurs captured in the United States, the Supreme Court took up the question of whether one of those captured, who held American citizenship, could be subject to a presidential proclamation denying him access to civilian courts. The Court held that "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."¹³ Therefore, whether citizen or not, violations of the laws of war are enough to give the military jurisdiction.

Absent such violations, civilians successfully had challenged military detention and trials. In *Ex Parte Milligan*, a citizen in Indiana was arrested and held by the military during the Civil War on charges of conspiracy. He was sentenced to death by a military commission and sought his release through a writ of *habeas corpus*. The Supreme Court held that the military commission did not have jurisdiction, because Indiana was not a state in rebellion, the federal civilian courts were open and unobstructed, and Milligan was a civilian and not subject to the laws of war.¹⁴ In *Duncan v. Kahanamoku*, the Supreme Court reaffirmed its reasoning in *Milligan*. The court held that because civilian courts remained open in Hawaii during World War II, martial law could not replace their jurisdiction over civilians.¹⁵ On the other hand, *Hirabayashi v. U.S.* and *Korematsu v. U.S.* upheld the right of the government to place Japanese-Americans on the West Coast under a curfew, and then to exclude them from the coast and intern them in concentration camps inland for the duration of the war. The Supreme Court, in upholding these actions, noted that they involved "joint concord," because Congress had acted as well as the president in developing the policy.¹⁶ But there is more to the story than these two cases. The Supreme Court, as part of a package deal involving *Korematsu*, also decided *Ex Parte Endo*, a case in which it determined that without an *individual* determination that someone should be interned, there was no rational reason that could justify mass internments.¹⁷ In all of these cases, the federal courts, not military authorities, had the final word on whether or not an action authorized by the president and carried out by military authorities was constitutional. And it had only ruled in favor of the government in the World War II cases, because Congress had provided authorization.

So far as the Bush administration was concerned, anyone involved in the war on terror was not a civilian, but was an "enemy combatant" who might be held without charges, denied access to an attorney, and "softened up" by being kept in solitary confinement indefinitely. The Pentagon did not abide by customary international law and Geneva Convention obligations to disclose the names of combatants to the Red Cross—violations of which constitute a war crime under the War Crimes Act of 1996. The government took the position that the president could order these actions on his own authority as

commander in chief and that courts could not thereafter review such indefinite detentions; that presidential prerogative superseded congressional prohibitions against indefinite detention that would otherwise apply to American citizens; and that when it comes to combating terrorism, Congress had implicitly authorized the president to detain unlawful combatants when after 9/11 it had passed the Authorization to Use Military Force against terrorists.

Interrogation of Unlawful Combatants

Under the Geneva Conventions governing treatment of POWs, *lawful* combatants do not have to provide information to their captors beyond “name, rank and serial number” or other basic identification and may not be coerced or intimidated. However, the Bush administration argued that these Geneva protections would not apply to “unlawful combatants,” although under the Geneva Conventions, even unlawful combatants have the right to humane treatment; there are limits on interrogations; and while imprisoned, they have the right to communicate with protective agencies such as the Red Cross and Red Crescent—none of which was granted to them.

Common Article 3 of the Geneva Conventions provides that detained persons “shall in all circumstances be treated humanely,” and that “[t]o this end,” certain specified acts “are and shall remain prohibited at any time and in any place whatsoever.” What are termed “grave breaches” of the conventions by captors mistreating “protected persons” in their custody are considered to be war crimes. These include the following: (1) willful killing of protected persons such as injured combatants, POWs, and civilians under their control; (2) murder, mutilations, torture, inhumane treatment, outrages upon personal dignity, humiliating or degrading treatment, or causing great suffering or bodily injury to protected persons. Article I of the Convention Against Torture prohibits torture and defines it as any act intentionally inflicting severe pain or suffering (physical or mental) to obtain information or a confession from that person or someone else (e.g. a close relative).

It had always been an American military tradition, dating from George Washington’s generalship in the Revolutionary War, that prisoners were not to be mistreated. Abraham Lincoln during the Civil War issued General Order Number 100, Article 16, which prohibited torture irrespective of any military necessity. Pursuant to the Convention Against Torture, Congress passed a law making it a criminal offense for a U.S. citizen or foreign national resident in the United States to commit or attempt to commit torture under color of law outside the United States.¹⁸ The law defines torture as an “act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain. . . .” Not covered under this anti-torture statute are U.S. diplomatic, military, and other government facilities located abroad, as well as detention centers under U.S. jurisdiction—a huge loophole. But another prohibition against torture is the War Crimes Act of 1996 passed by Congress, which makes it a criminal offense for an American citizen or a member of the U.S. Armed Forces (citizen or noncitizen) to commit in the U.S. or abroad a grave breach of the Geneva Conventions.¹⁹

With the recommendation of the Department of Defense and over the objections of the State Department, President Bush issued the following order: "The United States Armed Forces shall continue to treat detainees humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." This language invoked Geneva and pledged humane treatment, only to subvert that promise with the loophole of "military necessity." Department of Defense civilian legal counsel then prepared legal memoranda justifying brutal interrogation methods: They argued that prisoners were unlawful combatants and not entitled to protection under the Geneva Convention; if there were no violations of the Conventions, then the Uniform Code of Military Justice prohibitions against war crimes would not be violated, because the Code requires that there be violation of the Conventions in establishing that a war crime has been committed. Secretary of Defense Donald Rumsfeld appointed a task force that recommended a set of extremely brutal methods of questioning, which Rumsfeld approved. Only methods that would have *lasting* physical or mental effects akin to organ failure or *permanent* disability would be considered torture and would be prohibited. Tactics that inflicted *temporary* pain or suffering, or mental disorientation, would not be considered torture, no matter how painful.

Seasoned interrogators and military lawyers in the Judge Advocate Generals' Offices of the uniformed services argued that use of aggressive interrogation techniques would lessen the likelihood that they could obtain the surrender of enemy forces, or gain the cooperation of local communities, or the assistance of friendly nations. The information obtained would be of questionable value, because those subjected to torture will say anything if they are broken—or nothing accurate (or usually nothing at all) if they are not. Use of these methods would put American personnel at risk if they were captured. Their arguments were overruled by the civilian political appointees in the Pentagon. Later, the use of torture was condemned by the top American commander in Iraq, General David Petraeus, who wrote a letter to his troops, explaining, "Some may argue that we would be more effective if we sanctioned torture . . . to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they are also frequently neither useful nor necessary."²⁰

In Afghanistan, interrogators of the 377th Military Police Company and interrogators under private contract (working for the CIA) used particularly brutal methods. Prisoners alleged that these techniques included administering beatings, keeping them in stress positions for long periods of time, immersing them in cold water, hanging them by chains, subjecting them to "waterboarding" (simulating drowning) and using sexual humiliations (taunting or violating Islamic strictures against seeing nude bodies). At least eight prisoners died while in American custody. At Guantanamo, more than 24,000 interrogation sessions were held in the first four years. Behavioral scientists had access to detainees to develop psychological profiles of Islamic radicals. The Justice Department argued that keeping prisoners in isolated confinement and using aggressive interrogation was the best way to obtain information.²¹ Numerous congressional and private organizations

conducted investigations that have established that maltreatment has been severe and systematic.²² FBI agents at Guantanamo protested to their superiors after witnessing interrogations, as did some naval personnel, but their objections did not lead to changes. Years later, retired generals Charles Krulak and Joseph Hoar would condemn the defense of torture by former CIA director Tenet and by leading Republican candidates for the presidential nomination (in 2007 debates), when they warned: If we forfeit our values by signaling that they are negotiable in situations of grave or imminent danger, we drive those undecideds into the arms of the enemy. This way lies defeat, and we are well down the road to it.²³

Military Tribunals

Evidence from these interrogations would be necessary to prosecute detainees, but it could not be admitted under the rules of military courts martial. The Bush administration decided that forums would be needed with different rules. On November 13, 2001, President Bush issued a military order based on his power as commander in chief.²⁴ It mandated the establishment of military tribunals (either inside or outside the territory of the United States), to be implemented subsequently through regulations developed by the Pentagon.²⁵ Those subject to the tribunals, at the discretion of the president, would be any noncitizen of the United States (including a resident alien) who was a member of al Qaeda, involved in “acts of international terrorism,” or had “knowingly harbored” others in the first two categories. U.S. citizens would not be subject to their jurisdiction.

The president would appoint military judges to the tribunals. He would determine who would be tried by such commissions, and if defendants were found guilty, would determine the sentence. There were some elements of the due process model in the tribunal proceedings. Defendants would be presumed innocent, would be given notice of charges before trial, and would not have to testify against themselves, with no presumption being drawn from their refusal. They could choose their own counsel (if they could afford them) or military counsel would be provided for them. The burden of proof would remain with the government. Defendants could call witnesses in their defense. Two-thirds of the panel would have to vote to convict. According to Department of Defence rules, the death penalty would be recommended only with a unanimous verdict. There was a right of appeal to an independent appeals board, on which civilians might serve.

However, in many respects, due process protections were wanting. No definition of “international terrorism” was provided in the order or in subsequent regulations. Group association and membership, rather than commission of concrete acts, could be the basis for detention and trial. A person could be charged and tried solely at the discretion of the president, without any judicial review of that decision. (In civilian criminal proceedings, the Fourth Amendment requires a prompt judicial determination of probable cause after an arrest has been made, usually defined as 48 hours.) Anyone charged could be held indefinitely at any location in the world, a provision that went far beyond Congressional intent in the USA Patriot Act, which specified only a limited

seven-day detention period, after which a person held must be charged with a crime or immigration violation, and which provides for judicial review in *habeas corpus* proceedings. The accused would be permitted a civilian lawyer of his choosing, but the attorney would have to be cleared for "secret" information under Defense Department guidelines. These lawyers would not have the right to be present if the commission or the President ordered "closed" proceedings. Even the accused could be ordered excluded from part or all of them. There would be no right to confront prosecution witnesses.

Perhaps most important, illegally and unconstitutionally obtained evidence would be permissible if it had "probative value to a reasonable person." This stands in sharp contrast to court-martials, in which strict rules of evidence similar to civilian courts apply. There would be no exclusionary rule for evidence illegally obtained, particularly by unreasonable search and seizure, or for illegally obtained confessions extracted by torture or maltreatment or other statements made by an accused or by witnesses.

Rights of appeal were limited: the appeals board could only examine the evidence, and could not apply the Constitution or federal laws. There would be no right of appeal to the civilian courts: this stands in contrast to courts-martial cases, which may be reviewed by the Court of Criminal Appeals, then by the Court of Appeals for the Armed Forces, and then by the U.S. Supreme Court. Finally, the Pentagon intimated that even a defendant acquitted by a tribunal might still be kept in custody if thought to be dangerous.²⁶

The administration claimed the president had constitutional authority to establish such commissions by fusing his power as commander in chief with his oath of office to defend the Constitution. It pointed to what it considered to be past precedents under the constitution, including the establishment of military courts in the Civil War, in the Second World War, and in the Korean War (though in the last instance they were never used). The government also cited the Authorization for the Use of Military Force (AUMF) in which Congress that had authorized the president "to use all necessary and appropriate force against those nations, organizations, or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."²⁷ Using it for tribunals was a stretch, because the resolution contemplated military action against Afghanistan and was not passed in order to provide a framework for apprehending and trying terrorists. The administration also pointed out that the Uniform Code of Military Justice, established by Congress, refers to the establishment of military tribunals by the president.²⁸ But Congress had specifically provided in Section 36 of the law that such tribunals "may not be contrary to or inconsistent with the UCMJ."

Bush's military order drew rejoinders from critics, and not only from civil libertarians and partisan opponents: Rule-of-law centrists and right-of-center libertarians also opposed this expansion of governmental power. The American Bar Association House of Delegates, by a vote of 286 to 147, recommended that defendants tried before military tribunals be guaranteed traditional legal

protections and resolved that the special courts be used only in limited circumstances and under established legal and constitutional rules. American allies abroad, including the British and Australian governments (who had sent forces to Iraq and Afghanistan), condemned the procedures approved by the president.

Defense Department officials discouraged private pro bono lawyers from defending detainees. The Justice Department proposed to limit lawyers to three visits at Guantanamo, and to allow government officials to deny counsel access to secret evidence without obtaining court authorization. It proposed monitoring attorney-client mail.²⁹ The Pentagon proposed barring lawyers who violated rules from visiting clients, without requiring approval from judges.

THE INTELLIGENCE MODEL IN THE COURTS

Private lawyers (some working for civil liberties organizations) and military counsel assigned to detainees moved to challenge many of the assertions of prerogative power.

Indefinite Detention of Unlawful Combatants

Shafiq Rasul, Asif Iqbal, and David Hicks, captured in Afghanistan and held at Guantanamo Bay, denied they were enemy combatants or members of al Qaeda. After interrogation, they confessed to having attended terrorist training camps in Afghanistan and identified themselves in a videotape taken of Osama bin Laden. Petitions for *habeas corpus* were brought in federal district court by the Center for Constitutional Rights, claiming that because the 1903 Lease Agreement with Cuba gave the United States “complete jurisdiction and control over and within Guantanamo,” the United States had *de facto* sovereign powers, and therefore prisoners held there should be granted the same rights as if they had been held on U.S. territory, which would preclude indefinite detention without trial. When the Supreme Court accepted the case, the main issue was whether federal courts had jurisdiction to consider challenges to detention of foreigners at Guantanamo. That, in turn, would require the court to decide whether a 1950 case involving military trials outside the territory of the United States, *Johnson v. Eisentrager*, was a controlling precedent.³⁰ In that case, the court had decided that a combatant held after World War II had no *habeas corpus* rights if held outside the territory of the United States.

The majority opinion, written by Justice Stevens, distinguished the status of the detainees from the German prisoners of war in the *Eisentrager* case, who had been held on German soil. Rasul and others were not nationals of countries at war with the United States; they denied having plotted acts of aggression; they had not been afforded access to any tribunal or charged with any crime; and for more than two years, they had been imprisoned in territory over which the United States exercised exclusive jurisdiction and control. Congress had provided for the right of habeas review on American territory. Stevens held that Guantanamo was such territory, because the United States exercises plenary and

exclusive jurisdiction, although not ultimate sovereignty, and so the petitioners had the right to *habeas corpus* review. He also held that in the absence of such a congressional statute the aliens would have had no constitutional right to such review. Shortly thereafter, British Intelligence demonstrated to American authorities that the two English nationals (Rasul and Iqbal) had been in England at the time the video alleging their involvement with bin Laden had been produced, and they were released and repatriated in 2005. Subsequently, the Pentagon instituted an unusual and secret “do-over” procedure: It can order a subsequent hearing if the first board makes a determination with which it disagrees and can continue until a review board approves the detention of a detainee.

In the next important case, the Supreme Court, in a 5-3 decision ruled in *Hamdan v. Rumsfeld* that the president had authority granted by Congress to establish military commissions.³¹ The court ruled that trials in civilian courts were not required for detainees, and none of the justices insisted on closure of Guantanamo or other military detention facilities. Justice Stevens, writing for the majority (himself a veteran of World War II) noted that “Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities.” The court’s decision was not a complete victory for the government, because it then considered and rejected many of the procedures for the commissions established by the president. Stevens held that Congress had required that military commissions comply with the laws of war, and unless Congress otherwise provides, the president’s conduct is subject to limitation by statutes and treaties and must comply with the international laws of armed conflict. Congress had also provided that rules and regulations for such commissions be uniform so far as practicable with rules for courts martial. But the military tribunals violated the UCMJ and the Geneva Conventions: A detainee could be excluded from the proceedings; the detainee or counsel could be denied the right to see evidence, and evidence obtained under duress could be admitted. The court ruled that only Congress had the authority to establish tribunals with such procedures; otherwise Common Article 3 of the Geneva Conventions applied to al Qaeda terrorists. They could be tried and punished only by a “regularly constituted court,” which meant an “ordinary military cour[t]” that is “established and organized in accordance with the laws and procedures already in force in a country.” A military commission can be “regularly constituted” only if some practical need explains deviations from court-martial practice. The court found that no such need had yet been demonstrated by the administration. Four justices agreed with Stevens that the phrase “all the guarantees . . . recognized as indispensable by civilized peoples” in Common Article 3 must be understood to incorporate at least some trial protections recognized by customary international law. Justice Breyer’s concurring opinion invited Congress to clarify its intent about procedures for future trials of detainees.³²

President Bush, putting the best face on the decision, claimed that the high court had approved the use of tribunals and announced that he would ask Congress to determine whether military tribunals would be the right approach, and to authorize the tribunals in statutory law.³³ The Pentagon then accelerated its policy of transferring detainees back to their home countries: It released

nearly one-third of the prisoners at Guantanamo, because they posed no threat to U.S. security, and Pentagon officials indicated that most of the remaining would eventually be sent to their home countries or released because they no longer had any intelligence value. Hamdan, however, was charged with conspiracy and providing support for terrorism (he was a driver and bodyguard for Osama bin Laden) and faced trial in 2007. The Pentagon intended to charge only 60 to 80 of the more than 600 detainees it had held.

Indefinite Detention of American Citizens

A Saudi national, Yaser Esam Hamdi, was captured in Afghanistan on the battlefield by the Northern Alliance, was sent to Guantanamo Bay, but then quickly transferred to the Navy brig in Norfolk Naval Station in Virginia, (where he was held in solitary confinement with only the Red Cross and interrogators having access) after it was learned that he had been born in the United States and was an American citizen. Hamdi was an “enemy combatant,” ineligible for protections under the rules regarding prisoners of war, and the Justice Department argued that he could be held without trial indefinitely. It further argued that the executive, and not the courts, had the right to make the final determination on his status, and therefore Hamdi had no need for or right to counsel. This was the first time that the government had argued that an American citizen could be detained *indefinitely* without charges, without access to a lawyer, and without access to courts for habeas corpus review.

A lower federal court ruled that Hamdi could not be held indefinitely, but a three-judge panel of the federal appeals court in Richmond, Virginia, upheld the government’s view. Chief Judge J. Harvie Wilkinson characterized the detention as an intelligence gathering effort after a military operation, not as a part of the criminal justice process, although he did express concern that in the absence of such judicial review of the classification, “any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel.” The panel’s decision was affirmed by the full appeals court.

Hamdi’s counsel appealed the ruling to the Supreme Court. In argument before the justices, Deputy Solicitor General Paul D. Clement insisted that “[no] principle of the law or logic requires the United States to release an individual from detention so that he can rejoin the battle,” considering that the United States “still have 10,000 U.S. troops in Afghanistan.” The Supreme Court decided in an 8-1 decision that even alleged “enemy combatants” have the right to a fair hearing to determine their status and that federal courts retain *habeas corpus* review of the fairness of such procedures.³⁴ Justice O’Connor, writing the majority opinion, crafted a set of guidelines for the military to use in developing its hearing procedures. The opinion was criticized by Justice Scalia, in dissent, who argued that the writ of *habeas corpus* should have been applied, and Hamdi should have been under the jurisdiction of federal courts, not the military tribunal system.

As a result of the Supreme Court decision, the government decided to end Hamdi’s detention. He was deported to Saudi Arabia on condition that he renounce his American citizenship, which he did on October 11, 2004, shortly

after he returned to Saudi Arabia, and agreed not to leave the Kingdom for five years, and never to travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank, or the Gaza Strip.

THE ILLUSION OF CONGRESSIONAL CHECKS

Bush's use of prerogative power might have been checked by Congress. As it turned out, a Republican president could count on the support of Republican majorities in the House and Senate, and this partisan backing meant that congressional activity provided only the illusion of effective checks and balances for the first five years of the war on terrorism.

Statutory Authorization for Warrantless Surveillance

In the aftermath of revelations that President Bush had authorized the NSA to conduct warrantless electronic surveillance, bypassing the provisions of the Foreign Intelligence Surveillance Act, a Republican-controlled Congress talked about putting the program on a statutory basis. President Bush attempted to forge a compromise with moderate Senators on the Judiciary Committee, and Chairman Arlen Specter (R-PA) drafted S. 2453, the National Security Surveillance Act of 2006. The measure did not roll back presidential prerogatives but instead provided the White House with recognition of these presidential powers and legal protections for those implementing them. It provided retroactive legal immunity for the participants in the both the disclosed and any undisclosed (i.e., those not yet known by Congress) surveillance programs authorized by the president since 9/11. Any legal challenges alleging violations of civil liberties would be taken to the FISA Court of Review if the attorney general claimed grounds of national security, thus stopping a series of lawsuits in federal and state courts in their tracks. According to the Senate bill, the intelligence court, dominated by judges favoring the Intelligence Model, "may dismiss a challenge to the legality of an electronic surveillance program for any reason," and its proceedings and decisions would remain secret. The bill recognized a unilateral presidential authority for warrantless surveillance, even as it established procedures for judicial warrants: Section 801 stated that "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." It provided that electronic surveillance was to be authorized "under the constitutional authority of the executive or the Foreign Intelligence Surveillance Act of 1978" eliminating the prior provision of law that had prescribed FISA as being the "exclusive means" of electronic surveillance.³⁵ Finally, even if using FISA procedures, the NSA no longer would need to obtain a warrant to conduct surveillance on an individual, but rather needed to win court approval only for a "program" of surveillance.

Critics complained that Specter's bill acknowledged a presidential prerogative and did nothing to limit it. Specter countered that, "The bill does not accede to the president's claims of inherent presidential power; that is for the

courts either to affirm or reject. It merely acknowledges them, to whatever extent they may exist.”³⁶ Some Republicans felt the measure provided the administration with too much latitude: Senators Craig, Sununu, and Murkowski proposed removing the language referring to the president’s inherent constitutional authority, as well as the provision involving “program” warrants.

Time ran out on the Republican Congress before it could pass a bill. As Democrats took control in 2007, Congress was likely to pass a measure that would reaffirm FISA procedures and curtail warrantless surveillance. But in order to overcome a Senate filibuster, it was also likely that such a bill would have to include some language allowing the president to certify the necessity for such surveillance; expand the scope of targets; provide an immunity clause for prior surveillance; and transfer existing lawsuits to the FISA courts. And once Congress passed such a measure, federal courts would be likely to uphold warrantless surveillance on the grounds that “joint concord” had been established by the president and Congress.

Oversight of Interrogation

Congressional oversight of CIA and Pentagon interrogations was *pro forma* until newspapers published accounts of prisoner abuse at the prison at Abu Ghraib in Iraq. But with the Senate and House controlled by Republicans, committees did not direct their investigations at top administration officials, and Democrats did not have the votes to force the issue. Only lower level “grunts” and junior and mid-level officers were prosecuted after military investigations.

Congress eventually passed Senator John McCain’s (R-AZ) “anti-torture amendment” to a military authorization bill, a measure known as the Detainee Treatment Act (DTA), by a margin of 90 to nine. However, a close look indicates that this was a hollow gesture. McCain’s bill required that detainees in the custody of the military could be subjected only to interrogation techniques authorized by the *Army Field Manual* and that “no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”³⁷ His initial version of the bill covered CIA interrogations as well. McCain would have allowed a presidential waiver, “if the president determines that such operations are vital to the protection of the United States or its citizens from terrorist attack,” but after Vice President Cheney attempted to pressure him to withdraw the entire amendment, McCain stiffened his terms, removed the waiver provision, and got more than three dozen retired high-ranking military officers to sign letters of support. McCain met Bush in a “showdown” at the Oval Office, after which Bush agreed not to exercise his veto, but there was no reason for him to do so: The Pentagon was already in the process of revising the *Army Field Manual* to increase authority for extreme interrogations; the language of the amendment did not provide specific definitions of cruel, inhumane, and degrading treatment; and McCain had compromised on two key points: CIA officers and other civilians accused of abusive interrogation techniques could raise as a defense that they believed they were obeying a legal order; and interrogators charged with abuses would have

the right to government counsel. Finally, a separate provision of the DTA sponsored by senators Lindsey Graham (R-SC) and Jon Kyl (R-AZ) was more to the Bush administration's liking: Graham changed a prior draft that had forbidden the use of evidence from coercive interrogations, into the following provision: "to the extent practicable" courts martial or military tribunals would assess whether testimony was obtained as a "result of coercion," consider the "probative value" of illegally obtained evidence, and have the power to admit it. This was the first time Congress had legitimated using the fruit of torture in the courts.³⁸ The DTA also stripped the federal courts of the right to review the legality of their indefinite detentions through *habeas corpus* petitions from detainees.³⁹ Guantanamo detainees could have access to the courts only to appeal their enemy combatant status determinations and their convictions by military commissions. When Bush signed the measure into law, he issued a "signing statement" that indicated that he was giving up none of his prerogatives: "The executive branch shall construe [the law] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief." Treatment of detainees under the Pentagon guidelines would continue.

Congress and Military Tribunals

In response to the Supreme Court's *Hamdan* decision the Republican Congress passed the Military Commissions Act of 2006.⁴⁰ Rather than check the president's assertions of power the bill retroactively legitimated all that the president had ordered. It amended the War Crimes Act in order to immunize the CIA from prosecution for its interrogation techniques. It prohibited detainees' counsel from speaking about any information they received from their clients (including interrogation treatment) until they obtained classification review. It broadened the definition of enemies that the president could identify (not only those who fought the United States, but those who "purposefully and materially supported hostilities"), hold indefinitely and try through military commissions. It allowed the CIA to continue to hold and interrogate terrorists in prisons outside of U.S. territory, where they would be exempt from the anti-torture statutes. And it would allow evidence from any interrogations conducted by the military before passage of the Detainee Treatment Act of 2005, even if the interrogations had involved mistreatment amounting to "cruel, inhumane, and degrading treatment" (though it did ban evidence gained through torture). It banned the president from authorizing torture, but it would allow the president to "interpret the meaning and application" of Geneva Conventions regarding cruel, inhumane, and degrading treatment (a provision that would reduce the interpretive role of the federal courts). The most controversial provision of the law was the prohibition against federal courts hearing *habeas corpus* petitions filed by any alien enemy combatant wherever detained, even in the United States. Congress, with this provision, stripped the federal courts of an entire category of habeas cases.

The law was subsequently challenged by *Hamdan*. In a decision by U.S. District Judge James Robertson, it was held that detainees do not have the right to challenge their imprisonment in U.S. federal courts, and a petition for a writ of *certiorari* (i.e., review by the Supreme Court) was denied by the

justices.⁴¹ Hamdan's military trial began thereafter. After the installation of a Democratic Congress in 2007, it seemed likely that a provision restoring *habeas corpus* review for federal courts would repeal the court-stripping provisions the Republican Congress had passed the year before, though it was doubtful that other provisions of the law would be repealed; if they were, there was hardly any chance they could pass over a likely veto by President Bush.

PARALLEL GOVERNANCE

Presidents claim prerogatives based on their commander-in-chief powers, their inherent and implied executive powers, or their responsibilities stemming from the oath of office. When taken to its extreme, the result is not merely a "unitary executive" in which all executive powers are to be exercised by the president and his subordinates, but rather parallel governance, in which the executive also exercises quasi-legislative and quasi-judicial powers that bypass the powers of Congress and courts.

James Madison in *Federalist No. 47* observed, that the "accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." He argued for a system of separation of powers, but pointed out that if a *complete* separation of power were achieved (so that Congress exercised all legislative power and only legislative power, the president exercised all executive power and only executive power, and the courts exercised all judicial powers and only judicial powers), the institution that was assigned all legislative power would be so powerful it would suck the other institutions into the "legislative vortex." Madison proposed *partial* separation of powers, in which some powers would overlap and some would blend, so one department could exercise powers considered to be a part of another department. And so, in spite of the fact that the Constitution assigned "the judicial power" to a Supreme Court, Congress has a power of subpoena; it may hold witnesses at hearings in contempt; it conducts impeachments as a trial; and the president has a power to issue reprieves and pardons for offenses against the United States. Similarly, Congress does not exercise all legislative powers: Executive orders, executive agreements, military orders, and proclamations all have the force of law, and Supreme Court "landmark" decisions are as broad as legislation passed by Congress.

Partial separation doctrine allowed President Bush to cobble together a set of concurrent powers and institutional practices, first to set policies in the war on terror, then to implement them unilaterally, and finally to pass judgment, all the while claiming the power to avoid judicial review. He did so at a time when public opinion tended to be skeptical of the exercise of power yet insistent on strong measures for national security, when the judiciary acted at times to preserve its own jurisdiction but otherwise did not overturn presidential policies, and when Congress cared more about partisan solidarity than it did about insisting that framework laws it had passed to preserve civil liberties be faithfully executed by the President.

ENDNOTES

1. "60 Minutes II" *CBS Network*, September 11, 2002.
2. Quoted in Charles Lane, "Fighting Terror vs. Defending Liberties," *The Washington Post National Weekly Edition*, September 9–15, 2002, p. 30.
3. George Tenet, *At the Center of the Storm*. New York: Harper Collins, 2007.
4. "Means of Attack" in "National Strategy for Homeland Security" (Washington, DC: The White House, 2002).
5. Richard K. Betts, "The Soft Underbelly of American Primacy: Tactical Advantages of Terror," in Demetrios Caraley, ed., *September 11, Terrorist Attacks, and U.S. Foreign Policy* (New York: Academy of Political Science, 2002), pp. 33–50.
6. Laurence Tribe, "Trial by Fury," *The New Republic*, December 10, 2001, p. 12; and Ronald Dworkin, "The Threat to Patriotism," *The New York Review of Books*, February 28, 2002, p. 47.
7. Richard Posner, "Security versus Civil Liberties," *The Atlantic Monthly*, November 2001, p. 46.
8. James Fallows, "How We Could Have Stopped It: The Plan We Still Don't Have," *The Atlantic Monthly*, January/February 2005, pp. 80–92.
9. For a defense of these policies see Viet D. Dinh, "Foreword: Law and the War on Terrorism, Freedom and Security After September 11," *Harvard Journal of Law and Public Policy*, Vol. 25, No. 4, 2002, p. 399.
10. POWs are those who have engaged in open, announced combat in accordance with the customs of war. According to the Third Geneva Convention, they are members of armed forces or militia, or organized resistance groups against the established government if they are under a chain of command and have a fixed recognition sign or uniform and carry arms openly, and conduct operations according to the laws and customs of war.
11. Unlawful combatants under Article 75 of the Geneva Convention are supposed to have trial by impartial and regularly conducted court, necessary rights and means of defense, presumption of innocence, the right to examine witnesses and right not to testify.
12. Diane Marie Amman, "Guantanamo," 42 *Colum. J. Transnat'l L.* (2004): 263.
13. *Ex Parte Quirin*, 317 U.S. 1 at 38.
14. *Ex Parte Milligan*, 71 U.S. 2 (1866).
15. *Duncan v. Kahanamoku, Sheriff*, 327 U.S. 304 (1946).
16. *Hirabayashi v. U.S.* 320 U.S. 81 (1943); *Korematsu v. US* 323 U.S. 214 (1944).
17. *Ex Parte Endo*, 323 U.S. 283 (1944).
18. 18. U.S.C. sec.2340A.
19. *War Crimes Act* 18 U.S.C. sec. 2441 (1996).
20. David H. Petraeus, Letter to U.S. military personnel from Headquarters Multi-National Force–Iraq (10 May 2007).
21. Neil A. Lewis, "Guantanamo Prisoners Seek to See Families and Lawyers," *The New York Times*, December 3, 2002, p. A22.
22. Steven Strassner, ed. *The Abu Ghraib Investigations* (NY: Public affairs, 2004; Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: the Road to Abu Ghraib*, (NY: Cambridge University Press, 2005); Generals Randall Schmidt and John Furlow on interrogations at Guantanamo, summarized at www.defenselink.mil/news/detainee_investigations.html. See also *Command Responsibility*, (NY: Human Rights First, 2006).
23. Charles C. Krulak and Joseph P. Hoar, "It's Our Cage Too: Torture Betrays Us and Breeds New Enemies," *The Washington Post*, May 17, 2007, p. A17.
24. "Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57831 (2001). Note that this was a military order, and not an executive order.
25. *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, Department of Defense Military Commission Order No. 1, March 21, 2002. The rules promulgated by the Pentagon are available at: www.defenselink.mil/news/Mar2002/d20020321ord.pdf.
26. According to Pentagon official William J. Hayes, II, in Katharine Q. Seelye, "Pentagon Says Acquittals May Not Free Detainees," *The New York Times*, March 22, p. 13.

27. P.L. 107-40 Sec. 2(a) (2001).
28. The use of commissions has been recognized by Congress in the Articles of War in 1920, the *Uniform Code of Military Justice* in 1950, and the *War Crimes Act of 1996*.
29. American Bar Association, Task Force on Treatment of Enemy Combatants Criminal Justice Section, Section of Individual Rights and Responsibilities, "Report to the House of Delegates, 2003."
30. 339 U.S. 763 (1950).
31. *Hamdan v. Rumsfeld* 126 S. Ct. 2749 (2006).
32. Jeremy Rabkin, "Not as Bad as You Think: The Court Hasn't Crippled the War on Terror," *The Weekly Standard*, July 17, 2006, Volume 11, Issue 41.
33. Sheryl Gay Stolberg, "Justices Tacitly Backed Use of Guantanamo, Bush Says," *The New York Times*, July 9, 2006.
34. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
35. 18 U.S.C. 2511(2)(e).
36. Arlen Specter, "Surveillance We Can Live With," *The Washington Post*, July 24, 2006, p. A19.
37. Title X, Defense Appropriation Act, 2006 (H.R.2863); Sections 1402–1405, Defense Authorization Act, 2006.
38. This amendment contradicts the flat prohibition on the use of testimony secured through torture or extreme coercion, contained in the *Uniform Code of Military Justice*, 10 U.S.C. sec. 863.
39. The Graham amendment was designed to render the Supreme Court decision in *Rasul v. Bush* 542 U.S. 466 (2004), a nullity. The court held that detainees at Guantanamo could file habeas petitions to contest their detentions. The amendment limits such review to the validity of decisions of the Combatant Status Review Tribunals, a preliminary proceeding. It would mean that federal courts could not determine if the McCain anti-torture amendment had been violated. Sec. 1005 of the *Detainee Treatment Act of 2005*, "Procedures for Status Review of Detainees Outside the United States."
40. P.L. 106–366, (2006).
41. *Hamdan v. Gates*, 127 S. Ct. 1507 (2007).

Reading 33

Decision Making in the Obama White House

JAMES P. PFIFFNER

Presidents attract extremely smart, ambitious people to serve in the White House, but the quality of the advice the president receives depends upon how he or she uses the available talent. Chief executives face daunting challenges in evaluating the onslaught of information, judging the perspectives of their subordinates, and ensuring that they receive advice based on presidential perspectives rather than on the priorities of their subordinates.

Political scientists who study presidential decision making have come to consider several factors as central to understanding White House organization and process: the level of centralization, the extent of multiple advocacy, and the use of honest brokers to manage advice to the president. This essay

examines President Obama's decision-making style with respect to these three factors and uses several case studies to illustrate them: economic policy, detainee policy, and decision making on the war in Afghanistan.

CENTRALIZATION, MULTIPLE ADVOCACY, AND HONEST BROKERS

Presidents have dealt with the challenges of obtaining useful information and advice in a variety of ways. To ensure that they receive advice from a broad perspective rather than from the necessarily limited perspective of their Cabinet secretaries who tend to be advocates for their own departments, presidents have expanded their White House staffs and used them as their primary advisors. In order to ensure that they do not make hasty decisions and neglect important considerations, some presidents have insisted on an orderly process of deliberation that includes opposing points of view and different policy options before making important decisions. Others have appointed "honest brokers" to their staffs to ensure that no important perspective from their staffers or Cabinet secretaries will go unheard. President Barack Obama continued to centralize policy advice in the White House and insisted on multiple advocacy in policy deliberations. He did not, however, appoint honest brokers but chose to control the details of policy making himself.

Centralization

Presidents since Eisenhower have steadily centralized control of policy and advice to the president in the White House staff. Presidents up through the mid-twentieth century had relatively small White House staffs and saw the members of their Cabinets as principal advisors. Eisenhower epitomized what has been called Cabinet government, American style. That is, he used his Cabinet as a deliberative body and delegated leeway for his Cabinet secretaries to make policy within their own departmental jurisdictions. He summed up his vision of the role of his Cabinet secretaries in his instructions to them: "You are not supposed to represent your department, your home state, or anything else. You are my advisers. I want you to speak freely and, more than that, I would like to have you reflect and comment on what other members of the cabinet say" (Burke 2010, 361).

John Kennedy, after the disaster of the Bay of Pigs invasion, began to centralize policy advice in the White House when he instructed McGeorge Bundy to "set up a little state department" in the White House. President Richard M. Nixon, with his legendary mistrust of the career bureaucracies, institutionalized White House staff units, such as the National Security Council (NSC) and the Domestic Policy Council, as alternative policy development centers. He wanted his own analytic capability under his direct control so that he did not have to depend on the department or agencies of the broader executive branch for policy advice. As a consequence, Nixon increased significantly the size of the White House staff.

In reaction to Nixon's centralizing approach to governance, President Jimmy Carter attempted what he called Cabinet government by delegating

discretion to his department secretaries. But after several years of frustration, he replaced five of his Cabinet secretaries and placed his confidence in the White House staff. President Ronald Reagan began with the intention of delegating to his Cabinet secretaries but soon realized that in order to control policy making, especially in foreign policy, he had to entrust it to his closest advisors.

Since Reagan, it has been generally accepted that presidents had to oppose the centrifugal tendencies of American government by depending primarily on their White House staffs at the expense of their Cabinet secretaries. The centralizing tendency of the presidency might seem on the surface to depend upon personal relationships and the preferences of presidents. Structural and systemic factors, however, drive the centralization of policy development into the White House. The perspectives of Cabinet secretaries are necessarily influenced by their policy perspectives and advocacy for their departments. To counteract these centrifugal tendencies, presidents need advice that cuts across department boundaries. In addition, White House staffers have the advantage of physical and psychological proximity to the president.

Given the steady trajectory of centralized policy making in the presidency, President Obama's continuation of the centralizing trend would be unremarkable. Yet Obama began his administration by promising his attorney general, Eric Holder, broad discretion in policy making on the prosecution of detainees in the war on terror. But after Holder had made some initial decisions, pressure from the White House staff, particularly Rahm Emanuel, convinced Obama to back off from some of Holder's decisions. As a result of what was seen as Holder's lack of political sensitivity, Obama abandoned his experiment with delegation, as I will discuss below.

Multiple Advocacy

Political scientists are students of structure and process and have argued that an orderly policy process can enhance presidential decision making; or at least the lack of an orderly process will probably hurt it. As President Dwight D. Eisenhower observed, "Organization cannot of course make a successful leader out of a dunce, any more than it should make a decision for its chief. But it is effective in minimizing the chances of failure and in insuring that the right hand does, indeed, know what the left hand is doing" (1965, 630).

Alexander George (1972, 1980) argued that presidents needed to assure that their advisory systems provide them with a range of alternatives for any important decision and that the best way to assure this was a system of "multiple advocacy." He argued that the mere presence of differing views among White House staffers did not guarantee the effective presentation of alternatives to the president. Thus, the system had to be consciously structured so that the representatives of different alternatives possessed similar intellectual and bureaucratic resources. Importantly, the implementation of multiple advocacy calls for active participation by the president in order to assure a balanced and structured debate over policy alternatives (George 1980, 193).

The comparison of two crucial decisions on Vietnam illustrates the importance of structuring advice to the president: Eisenhower's decision in 1954 not to commit U.S. ground troops and Lyndon Johnson's decision in 1965 to escalate the U.S. military commitment. Eisenhower structured his approach to elicit conflicting perspectives and considered them explicitly. Johnson's approach, in contrast, tended to narrow his options and discourage debate.

In 1954, President Eisenhower faced the decision of whether to intervene in Vietnam to rescue French forces that were surrounded at Dien Bien Phu or to allow the French to be defeated and pushed out of Vietnam. Eisenhower had developed a national security policy-making process that was relatively formal and based on the direct confrontation of policy alternatives. In his memoirs he described his approach: "I know of only one way in which you can be sure you've done your best to make a wise decision. This is to get all of the people who have partial and definable responsibility in this particular field, whatever it may be. Get them with their different viewpoints in front of you, and listen to them debate" (Burke and Greenstein 1991, 54). After a full airing of opposing perspectives in front of him, Eisenhower decided that it would be wise not to intervene directly in Vietnam.

In contrast with Eisenhower's approach to decision making, President Johnson made a series of incremental decisions in the spring of 1965 that led to an open-ended commitment of U.S. forces to the war in Vietnam. Johnson did not encourage his advisors to confront fully the broader implications of their decisions, and they failed to recognize explicitly the implications of each stage of the escalation. In Burke and Greenstein's terms, the sequence of decisions "was simply devoid of analysis" (1991, 278). Johnson's series of decisions about Vietnam were in sharp contrast with Eisenhower's carefully orchestrated deliberations. Eisenhower forced confrontation of ideas among his advisors; Johnson suppressed disagreement. Johnson's insecurity and overbearing personality discouraged the open exchange of ideas; Eisenhower's experience and self-confidence led him to allow his judgments to be challenged in the course of deliberations. Johnson discouraged dissent; Eisenhower made it clear that he did not want yes-men. Eisenhower's NSC process was orderly and deliberate in allowing disagreements to be fully aired; Johnson's policy-making process, in Greenstein and Burke's analysis, was "an organizational shambles" (1989–1990, 575).

President Obama's major decisions exhibited careful (and sometimes lengthy) policy deliberations in which advocates for contrasting policy options directly confronted their disagreements, and often each other, in front of the president. In detainee policy, he brought Holder into the White House to directly confront those who opposed his decisions about trying accused terrorists in the civilian court system. In economic policy, he insisted that dissenting perspectives be presented to him directly in front of those favoring the consensus policy. During deliberations over Afghanistan, he insisted on being briefed on a counterterrorism alternative that Chairman of the Joint Chiefs Michael Mullen did not want released (Woodward 2010, 237–38).

Obama's approach to multiple advocacy was epitomized by the deliberations over the war in Afghanistan in the fall of 2009, leading up to his

decision to increase U.S. troop levels to more than 100,000. As Obama sought alternatives to sharp escalation, former Vice President Richard Cheney accused him of “dithering.” But Obama insisted upon a continuing dialogue until he was satisfied with his final decision. I examine Obama’s struggle to reconcile the disagreements over U.S. strategy below.

Honest Brokers

Obama continued the trend of centralizing policy making in the White House, and he seemed to adopt the deliberative multiple advocacy favored by students of presidential decision making. But he did not seem to make use of honest brokers in his deliberations during his first two years in office. A number of scholars have developed the honest broker concept: Alexander George (1980) and John Burke (2009) in national security policy making, Roger Porter (1980) in economic policymaking, and James Pfiffner (1993) with regard to the president’s chief of staff.

Alexander George, in his book, *Presidential Decisionmaking in Foreign Policy*, argued that the role of “custodian-manager” (honest broker) can be used as an important component of ensuring multiple advocacy in advising presidents. The honest broker acts for the president and ensures that deliberations involve advisors balanced in power and resources, brings in new advisors and different channels of information if necessary, and arranges for independent analyses of the premises of the debate (George 1980, 195–96).

In his book, *Honest Broker*, John Burke characterizes the honest broker roles as central to effective presidential decision making. He argues that “the NSC adviser is not just another policy adviser. Rather, the person in that position needs to be concerned with the fair and balanced presentation of information to the president and those advising the president (often called the ‘principals’) as well as the overall quality of the organizations and processes that come into play in decision making” (Burke 2009, 1).

Roger Porter, based on his experience directing the Economic Policy Board in the Ford administration, emphasized that all competing views must be weighed carefully and that the honest broker must “insure that interested parties are represented and that the debate is structured and balanced.” Porter described the role of honest broker:

The honest broker and his staff are not intermediaries between departmental advocates and the president, like a centralized management staff, but they do more than simply insure due process. They promote a genuine competition of ideas, identifying viewpoints not adequately represented or that require qualification, determining when the process is not producing a sufficiently broad range of options, and augmenting the resources of one side or the other so that a balanced presentation results. In short, they insure due process *and* quality control (1980, 26).

In the Bill Clinton administration, Robert Rubin, director of the National Economic Council, saw himself, as had Porter, as an honest broker.

Pfiffner has examined the chief of staff as honest broker, and argues that Cabinet secretaries as well as other White House staffers must have confidence that their views will reach the president in unaltered form. If they do not have this confidence, they will use whatever backchannels they can activate to get their views to the president. Needless to say, lack of trust and use of backchannels will lead to a dysfunctional advisory system, and the president will not be well served. He suggests that Jack Watson (for Carter), James A. Baker (for Reagan), and Leon Panetta (for Clinton) effectively acted as honest brokers for their presidents. They controlled access to their presidents with firm hands and enforced discipline in the policy-development process. On the other hand, domineering chiefs of staff, such as H. R. Haldeman (for Nixon), Don Regan (for Reagan), John Sununu (for G. H. W. Bush), did not act as honest brokers, and each resigned in disgrace (Pfiffner 1993).

If the top staffer does not carefully play the neutral broker role but becomes a policy advocate, the burden shifts to the president to assure that all legitimate perspectives are well represented. This takes personal time and energy and embroils the president in the details of policy alternatives (Rudalevige 2009). The advantage for the president is that he gains an in-depth understanding of the policy issues; the disadvantage is that he has to spend personal time moderating staff disputes and ensuring that the process is exposing him to a full range of alternatives.

During his first two years in office, President Obama chose not to use the role of honest broker in his major decisions. Obama's top economic aide, Larry Summers, explicitly rejected the honest broker role that Porter and Rubin had favored. As I show below, he tried to keep other economic policy advisors from getting their views to the president. Obama's chief of staff, Rahm Emanuel, was central to all of Obama's important decisions. But he acted as a policy advocate, particularly favoring a more moderate policy stance than Democratic partisans in Congress or other Obama advisors favored.

In deliberations over Afghanistan, National Security Advisor James Jones might have been an honest broker, but Obama relied heavily on Jones's deputy Thomas Donilon for advice. Jones often felt that he did not have the access to the president that he should have had, and Obama did not consult him in the way he had expected (Woodward 2010). On the other hand, Jones did play a major role in communicating between White House civilian leaders and the Pentagon by translating the concerns of each to the other.

OBAMA AS DECISION MAKER: THREE CASES

President Obama took a self-conscious approach to decision making and characterized his method as analytical and careful. He described his approach as pulling "together the best people and have them work as a team; insisting on analytical rigor in evaluating the nature of the problem; making sure that dissenting voices are heard and that a range of options are [*sic*] explored" (Walsh 2009). Obama explained his relatively cerebral approach to decision making

as a rational approach. “You’ve got to make decisions based on information and not emotions” (Achenbach 2009). Obama may have been implicitly contrasting himself with President George W. Bush’s approach to decision making when he declared “I just think it’s instinctive. I’m not a textbook player. I’m a gut player” (Woodward 2002, 137).

Detainee Policy

In his campaign for the presidency, Obama criticized the Bush administration for its interrogation policies and promised to close the prison at Guantanamo if he were elected. After he won, he moved to keep his promises in order to create “a clean break from business as usual” (Stolberg 2009). Two days after his inauguration, on January 22, he mandated the closing of the Guantanamo Bay detention facility “as soon as practicable, and no later than one year from the date of this order” (White House 2009a). The same day he issued an executive order directing the Central Intelligence Agency (CIA) to adhere to the policies specified in the Army Field Manual on interrogation, all of which comply with the Geneva Conventions; no “enhanced interrogation techniques” (EITs) could be used in interrogations (White House 2009b). Later in his first year, his administration decided to prosecute some Guantanamo detainees in the federal court system and to hold the trial of Khalid Sheikh Mohammed (KSM) in New York City. Republicans attacked Obama for each of these decisions, and political pressure forced him to change his stance on civilian trials for terrorism suspects and the venue for trying them. Congress prevented him from closing the Guantanamo Bay prison complex, but he held fast to his promise to outlaw coercive interrogations.

Obama made a number of policy decisions that changed the administration’s stance on these issues from a more “liberal” legal perspective to a more conservative and politically attuned stance. He rejected early policy advice from Attorney General Eric Holder and favored the more politically attuned White House advisors, particularly Chief of Staff Rahm Emanuel. The broader political sensitivity of Obama’s White House advisors overcame the more legally oriented judgments of the attorney general and the Justice Department. Decisions on detainee policy became more centralized in the White House within the first six months of the Obama presidency.

Despite previous bipartisan support for closing the Guantanamo Bay prison, which had become a symbol of the mistreatment and torture of suspects in the war on terror, Congress prevented Obama from doing so within the one-year deadline that Obama had promised (McNamara 2006; Baldwin 2009). Political opposition for closing Guantanamo began to build in the spring of 2009, and in May Congress passed an amendment with bipartisan support to a supplemental spending bill that dropped the \$80 million the administration had requested to close Guantanamo. It also prohibited spending appropriated funds for closing Guantanamo or bringing any of its detainees into the United States.

During the Bush administration, it became abundantly clear that in the course of interrogating suspects of terrorism, U.S. personnel had used very

harsh techniques (EITs) that sometimes amounted to torture and resulted in the deaths of detainees (Pfiffner 2010). Obama used the harsh treatment of detainees as a campaign issue, and he promised that such techniques would not be authorized if he were elected. His executive order of January 22 declared that Common Article 3 of the Geneva Conventions was a “minimum baseline” for the treatment of prisoners. It ordered that detained “persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person,” including outrages on their personal dignity and humiliating and degrading treatment. “From this day forward” interrogations would have to be consistent with Army Field Manual 2-22.3 (2006).

Vice President Cheney and other Bush administration officials severely criticized Obama for his abjuring of EITs and accused him of endangering the security of the country (Thiessen 2010). President Obama also enraged supporters of the Bush administration’s approach to interrogation by moving to release several memoranda on the use of EITs during the Bush era and photographs of U.S. personnel abusing detainees. While preparing to act in accord with a court order to release the memos (written by acting Office of Legal Counsel [OLC] Director Stephen Bradbury in May 2005) and photos, Obama was publicly entreated to reconsider by former CIA Director Michael Hayden, who organized other former directors of the CIA to object to the release. Emanuel and the political side of the White House warned the president that the release would cause a political backlash in the country, and Obama began to consider more seriously the political repercussions of the proposed actions.

On April 15, in reconsidering the advice of Attorney General Holder to release the memos, Obama, in an evening White House meeting, set up a debate on the issue between his counsel Greg Craig, who favored the release, and NSC aide Denis McDonough, who opposed the release (Calabresi and Weisskopf 2009). Obama finally decided to release the memos. But after listening to an argument by Secretary Robert Gates and others that public release of the photos would likely inflame Muslims and lead to more violence that would jeopardize U.S. lives, he decided not to release the photos. At the same time that the memos were released, Emanuel announced that the administration would not prosecute CIA agents who used interrogation techniques approved by the OLC of the Justice Department (Klaidman 2009). Emanuel prevailed over Holder on the issues of releasing the photos and not prosecuting CIA interrogators.

After suffering criticism for his ratifying questionable pardons at the end of the Clinton administration, Holder wanted to demonstrate his independence from Obama, who was also his friend. He also wanted to distinguish his approach to the attorney general’s office from the Bush administration’s tight White House control of legal issues. Thus, he convinced Obama to publicly delegate to him the authority to make decisions about prosecuting terrorist suspects in the war on terror.

Holder based his decision on November 13, 2009, to try the 9/11 suspects in criminal court on his conviction that civil trials would demonstrate American adherence to the rule of law, since the court system held the legitimacy

of centuries of jurisprudence and was seen internationally as a model of due process of law. He was convinced that civil courts, having conducted hundreds of trials of terrorists, were capable of effectively prosecuting the 9/11 terrorists. Holder concluded that "Trying the case in an article III [of the Constitution] court is best for the case and best for our overall fight against al Qaeda" (Kornblut and Johnson 2010). One argument for using Article III trials concerned the willingness of European countries, some of which were holding suspected terrorists, to extradite them to the United States for prosecution (Savage and Shane 2010). They would hesitate to send suspects to the United States unless they were confident that due process would be guaranteed.

Obama ordered an in-depth review of the legal cases against Guantanamo detainees by a committee of the Justice Department, with representatives from the Departments of State and Defense, the CIA, and the Federal Bureau of Investigation (FBI). With the committee's and Holder's advice, Obama decided that 25 Guantanamo detainees could be prosecuted either in Article III courts or military commissions, and 110 detainees could be released. He also announced that the United States would continue to hold some detainees without charges or trials. Such a policy amounted to indefinite detention without trial, for which liberals criticized him.

Holder and advocates for trying detainees in civil courts argued that Article III courts represented what was best in U.S. legal institutions and were a tried and true instrument of the U.S. justice system. They also noted that Common Article 3 of the Geneva Conventions requires that defendants be tried by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (Pfiffner 2010, chap. 3). They also argued that military commissions had only recently been set up by the Military Commissions Act and that trial procedures had not been tested in court or been subject to appeals. Thus, military commission procedures would much more likely be overturned by appellate courts than the procedures of Article III courts, which had survived appeals for decades. In pointing out the limited experience with military commissions, they noted that only three terrorists had been tried by military commissions, two of which were subsequently released.

Obama's earlier delegation decision allowed Holder to decide which detainees would be tried in which venue. But when Holder announced his decision to try some of the 9/11 suspects in federal court, Republican critics loudly objected. They argued that civilian trials would provide too many defendants' rights to suspects and that the defendants could use their trials to make public statements denouncing the United States. In contrast, the military commissions would allow hearsay and coerced testimony to be introduced as evidence.

The issue came to a head when, on December 25, 2009, Umar Farouk Abdulmutallab attempted to blow up an airplane using explosives that had been hidden in his underwear. He was unsuccessful, and the FBI took him into custody and questioned him about his terrorist connections. After weeks of public criticism of the administration's decision to prosecute him in court, Attorney General Holder wrote to Minority Leader Senator Mitch McConnell to explain the administration's policy. Holder pointed out that every terrorist suspect captured in

the United States by the Bush administration, from 9/11 to 2009, was handled under the criminal law in Article III courts. The criminal justice system convicted more than 300 suspects and put them in jail (Center for Law and Security 2009).

When Holder decided to charge KSM, the self-proclaimed mastermind of 9/11, in federal court, he also decided that the venue would be New York City, since that was the “State and district wherein the crime [had] been committed” (Sixth Amendment). Because of the political volatility of the issue, the White House did not allow Holder to defend his venue decision publicly (Kantor and Savage 2010). The political backlash from the decisions to prosecute suspected 9/11 plotters and the Christmas hijacker in civil court created a political tempest, and the advocates for military commissions seemed to have public opinion on their side.

From the beginning of the administration, White House political aides, led by Chief of Staff Emanuel, did not want contentious national security issues to endanger the administration’s domestic policy agenda, and they tried to get Holder to react more sensitively to partisan political factors (Kantor and Savage 2010). For instance, Senator Lindsey Graham felt strongly that any 9/11 trials should be held by military commissions, and he offered to try to get Republican support for closing Guantanamo Bay if the administration would agree to try KSM and others by military commissions rather than Article III courts.

Rahm Emanuel thought that Graham’s help in closing Guantanamo was crucial and wanted to reduce the partisan attacks about trials of terrorist suspects, so he continued to work with Senator Graham to cut a deal. According to Emanuel, “You can’t close Guantanamo without Senator Graham, and KSM was a link in that deal” (Kantor and Savage 2010). Thus, Obama faced the dilemma of backing the initial decision of Holder about the best legal strategy for handling detainees or bowing to political pressure and switching from civil court trials to military commissions. Senators John McCain and Joseph Lieberman intensified political pressure when they introduced legislation that would have required all foreign terrorism suspects to be tried by military commissions rather than civil courts. Faced with this delegation-centralization dilemma, Obama chose to centralize.

These changes of policy by President Obama illustrate the forces for centralization of policy making in the White House. When Holder’s decisions attracted political backlash, the White House staff, particularly the chief of staff, convinced Obama that the political repercussions of Holder’s decisions were more important than Holder’s legal judgments and his independence from the White House. The centralization of control of high-visibility legal policy in the Obama White House staff exemplifies pressures faced by all contemporary presidents to ensure that departmental perspectives do not undercut broader presidential interests.

Economic Policy

Facing an economic disaster, President Obama announced his economic policy team in the third week of his transition. He chose Timothy Geithner, who had been head of the Federal Reserve Bank of New York, as his treasury secretary and Peter Orszag as director of the Office of Management and Budget.

In the White House, Christina Romer would chair the Council of Economic Advisers (CEA), and Jared Bernstein, the vice president's economic advisor, would come to play an important role. Larry Summers, as head of the National Economic Council, was to coordinate and lead the economic team. Obama wanted to reassure markets by bringing in the iconic Paul Volcker, who had chaired the Fed in the late 1970s and early 1980s, and had raised interest rates in order to wring inflation out of the economy. Volcker would act as senior advisor to Obama and head the President's Economic Recovery Advisory Board, though he did not have a position on the White House staff.

In order to assure that he was getting a full range of economic advice, Obama scheduled daily half-hour meetings on economic policy that were attended by Summers, Geithner, Orszag, Romer, Bernstein, and Emanuel (Alter 2010, 189; Lizza 2009). Summers chaired the meetings and was the only economic advisor to have an office in the West Wing (Calmes 2009). As with other major policy issues, deliberation centered in the White House, with Emanuel overseeing the process for Obama. During the crisis Secretary Geithner was central to the key decisions, but Obama made the decisions, and Emanuel acted as a day-to-day overseer of Geithner (Alter 2010, 194). During the auto bailout deliberations, according to Steven Rattner, Emanuel "effectively started supervising Tim [Geithner] on a daily basis" (2010, 68). In contrast, President Bush gave much more leeway to his Treasury secretary, Henry Paulson, to shape policy, particularly concerning the Troubled Assets Relief Program (TARP).

Although Emanuel coordinated the process of decision making, Larry Summers did his best to control substantive economic advice to the president. In contrast to Robert Rubin, who ran the National Economic Council for President Clinton, Summers made no pretense at trying to be an honest broker. Rubin saw his job as assuring that the president was exposed to the advice of all those whose advice he should hear. Summers, however, rejected the honest broker approach. Several years before he came to work for Obama, he declared that "It is not enough, if we are to make the world better, to sign on to processes that explore all positions but cede the hope of changing anyone's mind" (Lizza 2009).

Summers was known for his sharp intellect and impatience with other White House staffers. He warned Obama during his interview for the position that he would be an advocate for what he thought were the best policies rather than an honest broker. "I'm not without self-regard and I don't suffer fools or foolishness easily. [If you hire me] you are going to get a rigorous and serious argument" (Alter 2010, 190). Obama understood Summers's position, and its implications; lacking an honest broker in economic policy, Obama would have to spend more time himself ensuring that he received a broad range of judgment on economic matters.

In keeping with his statements to Obama, Summers's self-assurance led him to try to squeeze other economic advisors out of key meetings and access to the president. Early in the administration, he tried to keep Romer out of key meetings, but she appealed to Emanuel who made sure she was included

(Alter 2010, 198). He also tried to limit Geithner and Orszag's access to the president (Calmes 2009).

Summers was successful in minimizing access to the president of liberal economists from the Democratic left, such as Joseph Stiglitz and Paul Krugman, who favored nationalizing financial firms. Robert Reich, a liberal who had been in the Clinton administration, and Warren Buffet, a highly respected billionaire businessman, acted as advisors to Obama during the campaign but had no access once Obama became president and Summers took over economic policy making (Alter 2010, 205). Later in the administration Volcker believed that the government needed to take a stronger regulatory hand in the financial industry in order to prevent a repetition of the meltdown of the economy as had just occurred. Summers favored a more conservative, hands-off approach and kept Volcker from seeing the president (Alter 2010, 194).

The lack of an honest broker in economic policy making forced Obama to become closely involved in the details of policy making. Obama himself had to monitor the deliberation to ensure he was receiving a full range of options. At one point in early discussions, Volcker wondered "Why would the president want to know that level of detail?" (King and Weisman 2009). Obama deliberately sought out differing points of view. For instance, when he was considering a complex issue on the relationship of derivatives to the financial crisis and potential solutions, he felt that he had not been exposed to a full range of options, he ordered: "Get me some other people's opinions on this. I want more than what's in this room" (King and Weisman 2009).

At a decisive meeting (March 26, 2009) on the fate of the auto industry, Summers excluded CEA member Austan Goolsbee because he disagreed with Summers and thought that the government should not bail out the auto industry. At the meeting when Summers began the briefing, Obama cut him off, saying "I read the memo" and asked about a dissenting paragraph deep in the briefing memo. CEA Chair Romer said that the dissent was by Goolsbee, so Obama ordered him brought into the room and asked him to lay out his best argument for not bailing out Chrysler. Goolsbee did not prevail, but Obama wanted to be sure to hear his side of the argument (Alter 2010, 178; Rattner 2010, 130).

Despite criticisms from the left that Obama did not seriously consider a broader range of options, CEA Chair Romer made the case that a stimulus bill (American Recovery and Reinvestment Act) should have been larger than the \$787 billion. However, White House staffers intimately familiar with Congress argued that that would be treated as dead on arrival and that even the few Republican votes in favor would have been lost. Many Republicans in Congress criticized the president because they thought that the stimulus was too large and that it would increase the deficit too much.

In March 2009, there was strong pressure from the left to nationalize banks that were in serious trouble. Some on the right, however, felt that financial institutions, which had made poor business decisions, should be allowed to fail rather than being bailed out by the taxpayers. After considerable deliberation, Obama rejected the more extreme arguments from the left and the right. He followed the advice of mainstream economists in judging that

the economy would fall into a recession rivaling the Great Depression without government intervention. He finally decided to implement Geithner's plan to conduct "stress tests" on banks to reassure the markets and encourage private capital would flow to them (Lizza 2009). He rejected both the left's call for nationalization and the right's arguments to leave the financial markets alone.

Similarly, in the auto industry crisis, Obama did not go along with conservatives who thought that the auto industry had made fundamental business errors and should have suffered the fate that the market system imposed: bankruptcy and dissolution. In White House deliberations, CEA member Austan Goolsby argued unsuccessfully that Chrysler should not be bailed out. Neither did Obama agree with critics on the left who argued that the auto industry should have been nationalized, which would have been a sharp break with U.S. policy historically. Instead Obama chose to force Chrysler and General Motors (GM) to reorganize under time pressure in order to obtain TARP funds (Alter 2010, 179).

Some on both the right and left thought that the large financial firms should be broken up so that there would be no firms that could hold the economy hostage because they were too big to fail (Alter 2010, 201). When the financial regulatory reform was being finalized, Volcker argued that the Glass Steagall Act should be repealed, and regulations on large financial banks should be tightened. Summers prevailed in limiting the scope of the new financial regulatory regime. As with the other policies I consider in this article, Obama ended up with moderate approaches to economic policy.

Thus, in economic policy making, since Obama had no honest broker to lead policy discussions, he acted as his own orchestrator of debate and interrogator of his aides. He read the briefing papers, mastered the details of policy, and acted as his own honest broker. In this way his style more closely resembled the policy analytic approaches of Presidents Nixon, Carter, and Clinton than those of Reagan and George W. Bush, who tended to delegate the details of policy to their staffs. Obama's approach contrasted most starkly with that of President Bush, who let Vice President Cheney frame the issues, conduct detailed analysis, and dominate the policy process.

Escalating the Afghanistan War

In 2002, just prior to the Iraq War, Obama, in criticizing the Bush administration's plans for the invasion of Iraq, said "I'm not opposed to all wars. I'm opposed to dumb wars" (Obama 2002). And in his campaign for the presidency, candidate Obama voiced his opposition to the war in Iraq and promised to begin to extricate the United States from the country, though not in an "irresponsible" or precipitous way. Obama compared the "dumb war" in Iraq to the "good war" in Afghanistan, which he argued that the Bush administration had neglected in its buildup for the war in Iraq. Between 2001 and 2009, the U.S. situation in Afghanistan had deteriorated; the Taliban was making a comeback and challenged both the central Karzai government and local tribal leaders for control of the country.

In his deliberations over the war in Afghanistan, Obama came to three key turning points: the decision not to de-escalate the war, the decision to change the fundamental strategy from defeating to degrading the Taliban, and the decision to send 30,000 more U.S. troops early in 2010. Obama moved slowly in considering the major increase of U.S. commitment in Afghanistan and listened carefully to those who favored an escalation and those who argued for a smaller U.S. presence. Obama's approach to military decision making contrasted sharply with that of President Bush who proceeded using informal meetings and often excluded both political appointees and career officials from the deliberations.

Shortly after his inauguration, in March 2009 Obama decided to grant the military's request for more troops and sent an additional 21,000 troops to Afghanistan, bringing the number of troops to a total of 68,000 (aside from CIA personnel and military contractors). In May of 2009, he replaced the U.S. commander in Afghanistan, General McKiernan, with General Stanley McChrystal, who favored a counterinsurgency strategy that would focus on protecting the civilian population and building Afghan capacity to govern rather than narrowly focusing on killing enemy personnel.

In the summer of 2009, it became clear that the United States was continuing to lose ground in Afghanistan, and military leaders began to ask for more troops. On August 30, General McChrystal sent a report to Secretary Gates proposing a change in strategy to fully embrace and implement a counterinsurgency strategy that focused less on force protection and more on interaction with the local population and building governance structures. Later that month, McChrystal delivered his confidential formal troop request to the president with options for 40,000, 30,000, or 10,000 troops (Kornblut, Wilson, and De Young 2009).

After receiving McChrystal's request, Obama began a series of ten formal meetings over the next two months to decide the future of the U.S. military commitment in Afghanistan. The McChrystal memo recommending the options for increasing troop commitment was leaked to the press in mid September, and General McChrystal stated publicly in London on October 1 that a de-escalation in Afghanistan would be "shortsighted" (Wilson 2010). He was asked if he thought a narrow mission in Afghanistan was advisable; his response was "The short answer is no" (Baker 2009). McChrystal's public stance made it clear that if Obama decided against an escalation, his political opponents would be able to accuse him of ignoring his military commanders on the ground in Afghanistan.

As Obama deliberated with his aides over the next two months, he was praised by some for his careful reevaluation of the U.S. military posture in South Asia. But he was also faulted for his extended examination of options; former Vice President Cheney criticized Obama's deliberations as "dithering." Some Democrats, most notably Vice President Biden, had become skeptical of the ability of U.S. military forces to defeat the indigenous forces of the Taliban and favored focusing on directly attacking al-Qaeda forces wherever they were in the world.

McChrystal's memo emphasized the importance of indigenous governmental forces to an acceptable outcome for the United States. "A foreign army alone cannot beat an insurgency. This is their war." The U.S. would not be successful "until the Afghan people make the decision to support their government and are capable of providing for their own security" (McChrystal 2009, 2–5). He argued that the first "principal threat" to success was an "organized and determined insurgent" Taliban. But he identified the second principal threat as the government of Afghanistan itself, which the United States was supporting. "The second threat springs from the weakness of GIRoA [government of Afghanistan] institutions, the unpunished abuse of power by corrupt officials and power brokers, a widespread sense of political disenfranchisement, and a longstanding lack of economic opportunity." He argued that these conditions "generate recruits for the insurgent groups" (McChrystal 2009, 2–5). The U.S.-backed Afghan government itself constituted a major threat to U.S. success.

In contrast to General McChrystal's confidence that more troops would enable the United States to prevail in Afghanistan, Ambassador Karl W. Eikenberry expressed skepticism. With the encouragement of White House staffers, he conveyed his judgments in several cables (which were also leaked to the press) to the State Department. As a general in the Army, Eikenberry had been in charge of U.S. troops in Afghanistan and was appointed by Obama in early 2009 to be the U.S. ambassador. Eikenberry's skepticism about the Karzai government increased after the elections in August 2009 in which President Hamid Karzai won under suspicious circumstances and with accusations of electoral fraud. The judgment expressed in Eikenberry's cable was that the Afghan government had not "demonstrated the will or ability to take over lead security responsibility much less governance. Experience with troop increases, therefore, offers scant reason to expect that further increases will permanently advance our strategic purposes; instead they will dig us in more deeply" (Eikenberry 2009b). Further,

President Karzai is not an adequate strategic partner. The proposed counter-insurgency strategy assumes an Afghan political leadership that is both able to take responsibility and to exert sovereignty in the furtherance of our goal. Yet Karzai continues to shun responsibility for any sovereign burden, whether defense, governance or development. He and much of his circle do not want the U.S. to leave and are only too happy to see us invest further (Eikenberry 2009a).

Both career military leaders had looked at the same political and military situation and reached opposite conclusions about the best direction for U.S. policy.

Despite Eikenberry's advice to the president and probably as a result of the public stance of McChrystal, at the end of September Obama decided not to consider seriously a de-escalation of the U.S. commitment in Afghanistan. "I just want to say right now, I want to take off the table that we're leaving Afghanistan" (Baker 2009; Woodward 2010, 186). Nevertheless, Obama had not decided on how much or whether to increase the U.S. commitment.

Over the next eight weeks, the president's advisors engaged in a wide-ranging and thorough process of deliberation. Military leaders, along with Secretary Gates and Secretary of State Hillary Clinton, firmly advocated increasing

the U.S. troop presence significantly, by 40,000. President Obama, however, expressed skepticism about the need for that many troops and thought that a full counterinsurgency strategy would be impossible without many more troops than the 40,000 requested and that it would cost too much and take too long. He encouraged Vice President Biden to argue for Biden's preferred option: a "counterterrorism" campaign that would focus on defeating al Qaeda rather than on building a government in Afghanistan that Afghans would support. He instructed Biden, "I want you to say exactly what you think. And I want you to ask the toughest questions you can think of" (Woodward 2010, 160). Obama was, in effect, assigning Biden the role of "devil's advocate" in deliberations over U.S. escalation in Afghanistan (George 1980, 169–73). Several other White House staffers, including National Security Advisor Jones, his deputy Thomas Donilan, counterterrorism chief John Brennan, Emanuel, and Dennis McDonough, also expressed skepticism about a large increase in U.S. troop strength.

In a formal meeting on October 9, Obama made the key decision to change the U.S. mission to "degrade" rather than defeat the Taliban. According to Gates, "We need to eliminate Al Qaeda, but we only need to degrade the capability of the Taliban" (Sanger 2010, wk1; Woodward 2010, 219, 260).

Obama wanted to encourage frank disagreements about policy, but he also valued consensus once he made final decisions. "I welcome debate among my team, but I won't tolerate division" (Woodward 2010, 374). Obama and his White House aides became frustrated with what they considered recalcitrance on the part of military leaders to present him with several viable options for Afghanistan strategy. They insisted on their initial recommendation for the full 40,000 troop increase. At one point Obama expressed his frustration: "you guys just presented me four options, two of which are not realistic," and the third turned out to be very close to the 40,000 they favored. "That's not good enough. You have essentially given me one option" (Woodward 2010, 278). Chairman of the Joint Chiefs Admiral Mullen admitted that Obama was right and said "I didn't see any other path" (Woodward 2010, 279). At one point Admiral Mullen tried to stop the vice chief, General James Cartwright, from presenting a report on an alternative, counterterrorism approach. When Obama heard about the disagreement, he insisted on having a full presentation of the report (Woodward 2010, 237–38).

By late October, Obama had decided to increase troop strength, although he had not yet decided the size of the increase. On November 11, Obama declared "What I'm looking for is a surge" that would get the troops to Afghanistan quickly, but with a drawdown beginning date of July 2011 (Kornblut, Wilson, and De Young 2009, A19; Baker 2009). The term echoed George W. Bush's final increase in troop strength in Iraq. A "surge" implied that there would be a relatively quick increase in troop strength but a clear time line for beginning a drawdown. According to Jones, the intent was "to narrow the mission, and tighten the timelines" (Kornblut, Wilson, and De Young 2009, A19). The purpose of announcing a date to begin the drawdown constituted a signal to Karzai that the U.S. commitment was not open ended. According to an official at the November 23 meeting, Obama said, in effect, "We sent a message to Karzai of a short-leash, which is necessary now" (Kornblut, Wilson, and

De Young 2009, A19). Gates insisted that the drawdown timing be “conditions based,” that is, dependent on the situation on the ground in Afghanistan.

At a meeting with his military leaders the day before Thanksgiving, Obama thought that he had set the troop level increase at 30,000, but Pentagon officials came back the day after Thanksgiving with further questions on the level of troops (Woodward 2010, 307–15). Finally Obama decided that he had to specify in writing what he had decided. “Maybe I am getting too far down in the weeds on this, but I feel like I have to” (Woodward 2010, 315). His final terms included “a hard-and-fast 30,000-troop surge,” an official NSC review of progress in December 2010, and the beginning of a drawdown in July of 2011. After Obama’s decision, General David Petraeus remarked on Obama’s willingness to delve into the details of policy, “There’s not a president in history that’s dictated five single-spaced pages in his life. That’s what the staff gets paid to do” (Woodward 2010, 327).

Obama announced his final decision to his top civilian and military aides on November 29. The United States would send 30,000 more troops and try to get North Atlantic Treaty Organization (NATO) allies to supply 5,000 more, and the NSC would conduct a full-scale review of the situation in December 2010 (Kornblut, Wilson, and De Young 2009, A19). Even though Obama had clearly stated in his campaign that the war in Afghanistan was one of his priorities, his decision risked alienating his support on the left of the Democratic Party. Speaker of the House Nancy Pelosi highlighted the political difficulty of Obama’s decision to increase the U.S. commitment in Afghanistan when she publicly stated that support for the escalation in the House would not be automatic. “The president’s going to have to make his case” to the Congress on his own (Kane 2009, A4). Leon Panetta encapsulated Obama’s political situation concisely: “No Democratic president can go against military advice, especially if he asked for it” (Woodward 2010, 247).

In the deliberations over Afghanistan policy, Obama acted as his own honest broker. In Alexander George’s words, the “magistrate” is the “one who listens to the arguments made, evaluates them, poses issues and asks questions, and finally judges which action to take either from among those articulated by advocates or as formulated independently by himself after hearing them” (George 1980, 201). In dictating his memo on the terms of the escalation, Obama explicitly rejected the options presented by his military advisors and formulated his own option.

Obama’s approach to decision making about war contrasted clearly with the approach of President George W. Bush, who said that he was a “gut” player rather than an analytical decision maker (Woodward 2002, 137). The decision-making process in the Bush White House was often marked by secrecy, a lack of deliberation, and the exclusion of members of the administration and the career services who ordinarily would have been consulted on important decisions (Pfiffner 2009). Obama’s approach was inclusive and more consistent with scholarly conclusions that “multiple advocacy” would best inform presidential decision making.

President Bush, in making the decision to try enemy combatants by military commissions rather than in normal trials (federal courts or Uniform Code of Military Justice [UCMJ] courts), did not consult or inform key members of his national

security team, such as National Security Advisor Condoleezza Rice or Secretary of State Colin Powell. The order was drafted by David Addington, the vice president's lawyer, and was purposefully kept secret from the rest of the administration. Vice President Cheney gave strict instructions that others in the White House and Cabinet be bypassed before President Bush signed it. Vice President Cheney and Addington also engineered the decision to suspend the Geneva Conventions without full consultation with NSC principals. Although William Taft of the State Department had written a dissenting memo and Powell did have a chance to see President Bush and force an NSC meeting, the decision had already been made.

President Bush's initial decision to invade Iraq seems to have been made over the course of a year or so and was characterized by incremental decision making along the way. Paul Pillar, national intelligence director for the Near East and South Asia from 2001 to 2005, noted "the absence of any identifiable process for making the decision to go to war—at least no process visible at the time. There was no meeting, no policy-options paper, no showdown in the Situation Room when the wisdom of going to war was debated or the decision to do so made" (Pillar 2006, 55). CIA Director George Tenet agreed: "There was never a serious debate that I know of within the administration about the imminence of the Iraqi threat" or even a "significant discussion" about options for continuing to contain Iraq (Shane and Mazetti 2007).

President Bush's decision making on important war policies tended toward secrecy, top-down control, tightly held information, disregard for the judgments of career professionals, and the exclusion from deliberation of qualified executive branch experts who might have disagreed with those who initially framed the decisions (Pfiffner 2009; 2010). In contrast, President Obama conducted his decision making on the war in Afghanistan by deliberating and negotiating between military advocates of sharp escalation and civilian officials who favored a more modest approach. Although they did not get everything they wanted, Obama's military leaders won the debate. Thus, Obama and Bush took sharply contrasting approaches to military decision making.

CONCLUSION

All White House staffs reflect the values of their presidents, and Obama's White House staff reinforced his tendencies toward centralization, careful deliberation, and personal control of the details of policy. As have other recent presidents, he drew advice on all major decisions directly into the White House. The only surprise here was that he initially intended to delegate major legal decisions to Attorney General Holder. Political opposition, however, soon overcame this initial intention to delegate.

Careful, and sometimes lengthy, deliberation marked Obama's style of decision making. He insisted on multiple advocacy by requiring his staffers to argue their cases in front of him, as when he demanded that dissenting perspectives on economic and military policy be aired in person. He was criticized particularly for taking so much time to decide on whether and how much to escalate the war in Afghanistan. But the personal time he spent on a series of

meetings with his NSC and military leaders demonstrated his determination not to rush into major additional commitments of U.S. troops.

Perhaps the most striking characteristic of Obama's decision-making style was his personal involvement in the details of policy. Rejecting the use of an honest broker, either in principle or because of the personalities of the staffers he chose, Obama himself delved deeply into the major policies of his administration. In this, Obama resembled Presidents Carter and Clinton but contrasted sharply with Presidents Reagan and George W. Bush. When Obama thought that his military advisors were not giving him the range of options that he needed, he felt compelled to dictate a memorandum that specified exactly the details of his decisions on the escalation of the Afghanistan War.

Notably, all of Obama's major policy decisions moved his policies in a moderate direction, that is, away from the desires of the base of the Democratic Party and toward the center of the political spectrum. He reacted to political pressure on detainee policy by deciding to use military commissions for some trials and indefinite detention for some detainees. He rejected calls to nationalize banks and to let the auto industry giants GM and Chrysler fail. He resisted proposals to cut back on U.S. policies in Afghanistan but did not give the military as many troops as they had demanded.

Whether or not any of these policies would solve the longer-term problems they were intended to ameliorate, President Obama conducted the type of decision-making processes often advocated by political scientists. Obama's approach guaranteed that he fully examined all serious policy options. Whether or not he made wise decisions is a separate issue.

REFERENCES

- Achenbach, Joel. 2009. "Obama goes with head, not gut." *Washington Post*. November 25, p. 1.
- Alter, Jonathan. 2010. *The Promise: President Obama, Year One*. New York: Simon and Schuster.
- Baker, Peter. 2009. "How Obama Came to Plan for 'Surge' in Afghanistan." *New York Times*, December 6.
- Baldwin, Tom. 2009. "Barack Obama denied funding needed to close Guantanamo Bay." *The Times*, May 21, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6329778.ece.
- Burke, John P. 2009. *Honest Broker?: The National Security Advisor and Presidential Decision Making*. College Station: Texas A&M University Press.
- . 2010. The Institutional Presidency. In *The Presidency in the Political System*, ed. Michael Nelson. Washington, DC: CQ Press, 341–66.
- Burke, John P., and Fred I. Greenstein. 1991. *How Presidents Test Reality: Decisions on Vietnam, 1954 and 1965*. New York: Russell Sage Foundation.
- Calabresi, Massimo, and Michael Weisskopf. 2009. "The Fall of Greg Craig." *Time Magazine*, November 19. <http://www.dtime.com/time/printout0,8816,1940537,00.html>.
- Calmes, Jackie. 2009. "Obama's Economic Circle Keeps Tensions High." *New York Times*, June 8.
- Center for Law and Security. 2009. *Terrorist Trial Report Card, 2001–2009: Lessons Learned*. New York: New York University School of Law.
- Eikenberry, Karl W. 2009a. Cable to the Secretary of State "COIN Strategy: Civilian Concerns," November 6. <http://documents.nytimes.com/eikenberry-s-memos-on-the-strategy-in-afghanistan>.
- . 2009b. Cable to the Secretary of State "Looking Beyond Counterinsurgency in Afghanistan," November 10. <http://documents.nytimes.com/eikenberry-s-memos-on-the-strategy-in-afghanistan>.

- Eisenhower, Dwight D. 1965. *Waging Peace*. New York: Doubleday.
- George, Alexander L. 1972. "The Case for Multiple Advocacy in Making Foreign Policy." *American Political Science Review* 66 (3): 751–78.
- George, Alexander. 1980. *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice*. Boulder, CO: Westview Press.
- Greenstein, Fred, and John P. Burke. 1989–1990. "Dynamics of Presidential Reality Testing: Evidence from Two Vietnam Decisions." *Political Science Quarterly* 104 (4): 557–80.
- Kane, Paul. "Pelosi Says She Will Not Seek Votes for Troop Surge." *Washington Post*, December 17.
- Kantor, Jodi, and Charlie Savage. 2010. "Getting the Message." *New York Times*, February 15.
- King, Neil jr, and Jonathan Weisman. 2009. "A President as Micro Manager: How Much Detail Is Enough?" *Wall Street Journal*, August 12, <http://online.wsj.com/article/SB125003045380123953.html>.
- Klaidman, Daniel. 2009. "Independent's Day." *Newsweek*, July 20.
- Kornblut, Anne E., Scott Wilson, and Karen De Young. 2009. "Obama Pressed for Faster Surge." *Washington Post*, December 6.
- Kornblut, Anne E., and Carrie Johnson. 2010. "Obama to Help Pick Location of Terror Trial." *Washington Post*, February 12.
- Lizza, Ryan. 2009. "Inside the Crisis: Larry Summers and the White House economic team." *New Yorker*, October 12, http://www.newyorker.com/reporting/2009/10/12/091012fa_fact_lizza.
- McChrystal, Stanley. 2009. "Commander's Initial Assessment" Headquarters International Security Assistance Force Kabul, Afghanistan, August 30. http://www.google.com/search?source=ig&hl=en&rlz=&=&q=mcchrystal+commander%27s+initial+assessment&aq=0sx&aqi=g-sx1&aql=&oq=mccrystal%2C+commander%27s+ini&gs_rfai=C11hDQoTJTPm oKaDgyATjgsndDwAAAKoEBU_QiUEr.
- McNamara, Melissa. 2006. "Bush Says He Wants To Close Guantanamo." CBS News, May 8, www.cbanews.com/stories/2006/05/08/politics/main1596.
- Obama, Barak. 2002. "Against Going to War with Iraq," October 2. <http://www.informationclearinghouse.info/article19440.htm>.
- Pfiffner, James. 1993. "The President's Chief of Staff: Lessons Learned." *Presidential Studies Quarterly* 23 (1): 77–102.
- . 2009. "Decision Making in the Bush White House." *Presidential Studies Quarterly* 39 (2): 363–84.
- . 2010. *Torture as Public Policy*. Boulder, CO: Paradigm Publishers.
- Pillar, Paul. 2006. "Intelligence, Policy, and the War in Iraq." *Foreign Affairs*, March/April.
- Porter, Roger B. 1980. *Presidential Decision Making*. New York: Cambridge University Press.
- Rattner, Steven. 2010. *Overhaul*. Boston: Houghton Mifflin Harcourt.
- Rudalevige, Andrew. 2009. "Rivals, or a Team? Competitive Advisory Institutions and the Obama Administration." Paper presented at the Meeting of the American Political Science Association, Toronto.
- Sanger, David E. 2010. "Testing the Meaning of Victory." *New York Times*, February 14, wk1.
- Savage, Charlie, and Scott Shane. 2010. "Experts Urge Keeping Both Civilian and Military Options in Terror Trials." *New York Times*, March 9, A13.
- Shane, Scott, and Mark Mazetti. 2007. "Ex-CIA Chief in Book, Assails Cheney on Iraq." *New York Times*, April 27.
- Stolberg, Sheryl Gay. 2009. "On First Day Obama Sets New Tone." *New York Times*, January 21.
- Thiessen, Mark A. 2010. *Courting Disaster: How the CIA Kept America Safe and How Barak Obama Is Inviting the Next Attack*. Washington, DC: Regnery Publishing.
- Walsh, Kenneth T. 2009. *U.S. News and World Report*. October 27.
- White House, Office of the Press Secretary. 2009a. Executive Order: "Ensuring Lawful Interrogations." January 22.
- . 2009b. Executive Order: "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." January 22.
- Wilson, Scott. 2010. "The Making of a Wartime Commander in Chief." *Washington Post*, January 19.
- Woodward, Bob. 2002. *Bush at War*. New York: Simon and Schuster.
- . 2010. *Obama's War*. New York: Simon and Schuster.

Commander-in-Chief and National Security

Responsibility for guarding the national security and the war powers was divided by the Framers of the Constitution between Congress (which declares war) and the president (who is commander-in-chief of the armed forces). The other functions of making and conducting foreign policy are also divided between the two branches of government. Despite the intention of the Framers to give Congress an important—and sometimes dominant—role in foreign policy, the military realities of the 20th century made the conduct of foreign policy a realm dominated by the president. This section deals with the processes and politics of national security policymaking and how the two branches cooperate and compete in their efforts to control the foreign relations of the United States.

This section begins with an analysis by Louis Fisher of how the Framers of the Constitution divided the war powers of the government. Fisher argues that modern presidents have made claims to executive authority in foreign affairs that are not fully justified by the Constitution. Fisher argues that since the Truman administration, presidents have claimed more authority than is granted to them in the Constitution when they assert the right to take the country to war without formal congressional action. President Truman did this when he sent U.S. troops to Korea; President Johnson exceeded his authority in Vietnam, and President George W. Bush conducted the war in Iraq in ways that undermined the Constitution. Fisher concludes that there is an important constitutional role for Congress in war powers that presidents ignore only at their own peril.

In the next selection, James M. Lindsay traces the ebb and flow of control of foreign policy between the president and Congress over the history of the United States. He argues that how aggressively Congress asserts its own prerogatives depends importantly on whether the country seems to be under threat or whether it feels secure. For instance, after 9/11 Congress gave President Bush pretty much what he wanted in authorizations to take the country to war and to deal domestically with the threat of terrorism. But the further foreign policy issues are from immediate security concerns (e.g., trade policy) the less deference Congress is likely to grant power to the president.

The modern tradition of constraining the power of political executives has deep roots in Anglo-American governmental traditions, reaching back to Magna Carta. The Framers of the Constitution were influenced by their English constitutional heritage with respect to individual rights and drew heavily upon British precedents. But with respect to governmental structure, they rejected British precedent and created a separation of powers system based on a written Constitution. The principles upon which they designed the Constitution included explicit limits on the powers of government and a separation of powers structure intended to prevent the accumulation of power in any one branch of government. The selection by James Pfiffner examines several actions by President George W. Bush and argues that he made exceptional claims to presidential authority. Four instances of President Bush's claims to presidential power are examined: his suspension of the Geneva Agreements in 2002, his denial of the writ of habeas corpus for detainees in the war on terror, his order that the National Security Agency monitor messages to or from domestic parties in the United States without a warrant, and his use of signing statements.

Jules Lobel in the next selection examines the claims of President Bush to extraordinary authority under the commander in chief clause of the Constitution. Because the United States was engaged in the War on Terror, the Bush administration argued that the inherent powers of the president included the authority to act in the nation's defense and that Congress cannot constrain the president discretion to detain enemy combatants, to use harsh interrogation tactics, or to place U.S. citizens under surveillance without warrants. In addition, the administration argued that that U.S. courts have no jurisdiction to rule on the actions of the executive. Lobel challenges the reasoning of the Bush administration and argues that federal courts have always had jurisdiction to judge the extent of executive power under the Constitution, and he reviews recent decisions of the Supreme Court that undercut the Bush administration's arguments for unilateral authority in national security matters.

The final selection by Louis Fisher takes up President Obama's decision in the spring of 2011 to join other NATO countries in intervening in Libya to protect dissidents from being slaughtered by the forces of dictator Muammar Gaddafi. Obama decided to intervene without asking for congressional approval. After the initial military actions, U.S. forces continued to support NATO operations past the 60-days limit imposed by the War Powers Act of 1973. The Obama administration argued that U.S. involvement did not constitute "hostilities" as envisioned by the War Powers Act, but Fisher argues that by any normal use of the term, U.S. forces were engaged in military hostilities. Fisher concludes that President Obama, as had other presidents, was overstepping his constitutional bounds.

SELECTED BIBLIOGRAPHY

- Bose, Meena, *Shaping and Signaling Presidential Policy* (College Station, TX: Texas A&M University Press, 1998).
- John P. Burke, *Honest Broker?: The National Security Adviser and Presidential Decision Making* (College Station, TX: Texas A&M University Press, 2009).

- Draper, Theodore, *A Very Thin Line: The Iran-Contra Affair* (New York: Hill & Wang, 1991).
- Fisher, Louis, *Presidential War Power* (Lawrence, KS: University Press of Kansas, 1995).
- George, Alexander, *Presidential Decision Making in Foreign Policy* (Boulder, CO: Westview Press, 1980).
- Glennon, Michael J., *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press, 1990).
- Henkin, Louis, *Foreign Affairs and the Constitution* (New York: Free Press, 1972).
- Inderfurth, Karl F., and Loch K. Johnson, eds., *Decisions of the Highest Order* (Pacific Grove, CA: Brooks/Cole, 1988).
- Koh, Harold H., *The National Security Constitution* (New Haven, CT: Yale University Press, 1990).
- Mann, Thomas E., ed., *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington, DC: Brookings, 1990).
- National Commission on Terrorist Attacks Upon the United States, *The 9/11 Report* (NY: Norton, 2004).
- Pfiffner, James P., and Mark Phythian, eds., *Intelligence and National Security Policymaking on Iraq: British and American Perspectives* (Manchester, UK: Manchester University Press, 2008).
- Schlesinger, Arthur M., Jr., *The Imperial Presidency* (Boston, MA: Houghton Mifflin, 1973).
- Whicker, Marcia, James P. Pfiffner, and Raymond A. Moore, eds., *The Presidency and the Persian Gulf War* (Westport, CT: Praeger, 1993).

Reading 34

Presidential Power in National Security

LOUIS FISHER

Respect for the Constitution and joint action with Congress provide the strongest possible signal to both enemies and allies. By following those principles, other countries understand that U.S. policy has a broad base of support and is not the result of temporary, unilateral presidential actions that divide the country and are likely to be reversed. National security is strengthened when presidents act in concert with the other branches and remain faithful to constitutional principles.

In periods of emergency and threats to national security (perceived or real), the rule of law has often taken a back seat to presidential initiatives and abuses. Although this pattern is a conspicuous part of American history, it is not necessary to repeat the same mistakes every time. Faced with genuine emergencies, there are legitimate methods of executive action that are consistent with constitutional values. There are good precedents from the past and a number of bad ones.

In response to the 9/11 terrorist attacks, the United States largely decided to adopt the bad ones. The responsibility for this damage to the Constitution lies primarily with the executive branch, but illegal and unconstitutional actions cannot occur and persist without an acquiescent Congress and a compliant judiciary. The Constitution's design, relying on checks and balances and the system of separation of powers, was repeatedly ignored after 9/11. There are several reasons for these constitutional violations. Understanding them is an essential first step in returning to, and safeguarding, the rule of law and constitutional government.

MAKING EMERGENCY ACTIONS LEGITIMATE

The Constitution can be protected in times of crisis. If an emergency occurs and there is no opportunity for executive officers to seek legislative authority, the executive may take action—sometimes in the absence of law and sometimes against it—for the public good. This is called the “Lockean prerogative.” John Locke advised that in the event of executive abuse, the primary remedy was an “appeal to Heaven.”

A more secular and constitutional safeguard emerged under the American system. Unilateral presidential measures at a time of extraordinary crisis have to be followed promptly by congressional action—by the entire Congress and not some subgroup within it.¹ To preserve the constitutional order, the executive

prerogative is subject to two conditions. The president must (1) acknowledge that the emergency actions are not legal or constitutional; and (2) for that very reason come to the legislative branch and explain the actions taken and the reasons for the actions and ask the legislative branch to pass a bill making the illegal actions legal.

Those steps were followed by President Abraham Lincoln after the Civil War began. He took actions we are all familiar with, including withdrawing funds from the treasury without an appropriation, calling up the troops, placing a blockade on the South, and suspending the writ of habeas corpus. In ordering those actions, Lincoln never claimed to be acting legally or constitutionally, and he never argued that Article II somehow allowed him to do what he did.

Instead, Lincoln admitted to exceeding the constitutional boundaries of his office and therefore needed the sanction of Congress. He told Congress that his actions, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.” He explained that he used not only his Article II powers but also the Article I powers of Congress, concluding that his actions were not “beyond the constitutional competency of Congress.” He recognized that the superior lawmaking body was Congress, not the president. When an executive acts in this manner, he invites two possible consequences: either support from the legislative branch or impeachment and removal from office. Congress, acting with the explicit understanding that Lincoln’s actions were illegal, passed legislation retroactively approving and making valid all of his acts, proclamations, and orders.²

THE ILLUSORY CLAIM OF “INHERENT” POWERS

President Lincoln acted at a time of the gravest emergency the United States has ever faced. What happened after 9/11 did not follow his model. Although President George W. Bush initially came to Congress to seek the Authorization for the Use of Military Force, the USA PATRIOT Act, and the Iraq Resolution of 2002, increasingly the executive branch acted unilaterally and in secret by relying on powers and authorities considered “inherent” in the presidency.

On several occasions, the Supreme Court has described the federal government as one of enumerated powers. In 1995, it stated, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”³ It repeated that claim two years later.⁴ In fact, it is incorrect to call the federal government one of enumerated powers. If that were true, the Court would have no power of judicial review, the president would have no power to remove department heads, and Congress would have no power to investigate. Those powers (and other powers routinely used) are not expressly stated in the Constitution.

The Framers created a federal government of enumerated and implied powers. Express powers are clearly stated in the text of the Constitution; implied powers are those that can be reasonably drawn from express powers. “Inherent”

is sometimes used as synonymous with “implied,” but it is radically different. Inherent powers are not drawn from express powers. Inherent power has been defined in this manner: “An authority possessed without it being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers” (Black 1979, 703).

The purpose of the U.S. Constitution is to specify and confine governmental powers in order to protect individual rights and liberties. Express and implied powers serve that principle. The Constitution is undermined by claims of open-ended authorities that cannot be located, defined, or circumscribed. What “inheres” in the president? The standard collegiate dictionary explains that “inherent” describes the “essential character of something: belonging by nature or habit.”⁵ How does one determine what is essential or part of nature? Those words are so nebulous that they invite political abuse, offer convenient justifications for illegal and unconstitutional actions, and endanger individual liberties (Fisher 2007a).

Whenever the executive branch justifies its actions on the basis of “inherent” powers, the rule of law is in jeopardy. To preserve a constitutional system, executive officers must identify express or implied powers for their actions. They must do so reasonably and with appropriate respect for the duties of other branches and the rights and liberties of individuals.

It is sometimes argued that if the president functions on the basis of “inherent” powers drawn from Article II, Congress is powerless to pass legislation to limit his actions. Statutory powers, it is said, are necessarily subordinate to constitutional powers. There are several weaknesses with this argument. First, when the president says that he is acting under “inherent” powers drawn from Article II, that is nothing more than a *claim* or an *assertion*. Congress is not prevented from acting legislatively because of executive claims and assertions. Neither are the courts. Second, if the president wants to claim that powers exist under Article II, the door is fully open for Congress to pass legislation pursuant to Article I. Constitutional authority is not justified by presidential *ipse dixits*. The same can be said of congressional and judicial *ipse dixits*. When one branch claims a power, the other two branches should not acquiesce. Doing so eliminates the system of checks and balances that the framers provided.

MISUNDERSTANDING CURTISS-WRIGHT

Of all the misconceived and poorly reasoned judicial decisions that have expanded presidential power in the field of national security, thereby weakening the rule of law and endangering individual rights, the *Curtiss-Wright case* of 1936 stands in a class by itself. It is frequently cited by courts and the executive branch for the existence of “inherent” presidential power. In language that is plainly dicta and had no relevance to the issue before the Supreme Court, Justice George Sutherland wrote,

It is important to bear in mind that we are here dealing not alone with an authority vested in the president by an exertion of legislative power, but with

such an authority plus the very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁶

Justice Sutherland's distortion of the "sole organ" doctrine will be examined in the next section. It is sufficient to point out that the case before the Court had absolutely nothing to do with presidential power. It concerned only the power of Congress. The constitutional dispute was whether Congress, by joint resolution, could delegate to the president *its* power, authorizing President Franklin D. Roosevelt to declare an arms embargo in a region in South America.⁷ In imposing the embargo, President Roosevelt relied solely on this statutory—not inherent—authority. He acted "under and by virtue of the authority conferred in me by the said joint resolution of Congress."⁸ President Roosevelt made no assertion of inherent, independent, exclusive, plenary, or extra-constitutional authority.

Litigation on his proclamation focused on legislative power because, during the previous year, the Supreme Court twice had struck down the delegation by Congress of *domestic* power to the president.⁹ Therefore, the issue in *Curtiss-Wright* was whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs. A district court held that the joint resolution impermissibly delegated legislative authority but said nothing about any reservoir of inherent or independent presidential power.¹⁰ That decision was taken directly to the Supreme Court, where none of the briefs on either side discussed the availability of inherent or independent presidential power. As to the issue of jurisdiction, the Justice Department advised that the question for the Court went to "the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose."¹¹ The joint resolution passed by Congress, said the Justice Department, contained adequate standards to guide the president and did not fall prey to the "unfettered discretion" found by the Court in the two 1935 delegation decisions.¹²

The brief for the private company, Curtiss-Wright, also focused solely on the issue of delegated power and did not explore the availability of independent or inherent powers for the president.¹³ A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not attempt to locate any freestanding or freewheeling presidential authority.¹⁴ Given President Roosevelt's stated dependence on statutory authority and the lack of anything in the briefs about inherent presidential power, there was no need for the Supreme Court to discuss independent sources for executive authority.

Anything along those lines would be dicta. The extraneous matter added by Justice Sutherland in his *Curtiss-Wright* opinion has been subjected to highly critical studies by scholars. One article regards Sutherland's position on

the existence of inherent presidential power to be “(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous” (Patterson 1944, 297). Other scholarly works find similar deficiencies with Sutherland’s dicta (these works are summarized in Fisher 2007b; for a more detailed treatment of the sole-organ doctrine, see Fisher 2006b).

Federal courts repeatedly cite *Curtiss-Wright* to sustain delegations of legislative power to the president in the field of international affairs and, at times, to support the existence of inherent and independent presidential power for the president in foreign policy. Although some justices of the Supreme Court have described the president’s foreign relations power as “exclusive,” the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs (see Fisher 2006b, 23–28).

THE FALSE “SOLE ORGAN” DOCTRINE

Another defective argument for inherent presidential power is Justice Sutherland’s reference in *Curtiss-Wright* to a speech given by Representative John Marshall on March 7, 1800: “The President is the sole organ of the nation in its external relations, and its sole representatives with foreign nations.”¹⁵ When one reads Marshall’s entire speech and understands it in the context of a House effort to either impeach or censure President John Adams, nothing said by Marshall gives any support to independent, exclusive, plenary, inherent, or extra-constitutional power for the president. Marshall’s only objective was to defend the authority of President Adams to carry out an extradition treaty. In that sense, the president was not the sole organ in formulating the treaty or making national policy. He was the sole organ in *implementing* it. Marshall was stating what should have been obvious. Under the express language of Article II, it is the president’s duty to “take Care that the Laws be faithfully executed.” Under Article VI, all treaties made “shall be the supreme Law of the Land.”

Far from being an argument for inherent or plenary power, Marshall was relying on the express constitutional duty of the president to carry out the law. He emphasized that President Adams was not attempting to make foreign policy single-handedly. He was carrying out a policy made jointly by the president and the Senate (for treaties). On other occasions, the president might be charged with carrying out a policy made by statute. In that sense, the president was the sole organ in implementing national policy as decided by the two branches.

Even in carrying out a treaty, Marshall said, the president could be restrained by a subsequent statute. Congress “may prescribe the mode” of carrying out a treaty.¹⁶ For example, legislation in 1848 provided that in all cases of treaties of extradition between the United States and another country, federal and state judges were authorized to determine whether the evidence was sufficient to sustain the charge against the individual to be extradited.¹⁷

In his capacity as chief justice of the Supreme Court, Marshall held firm to his position that the making of foreign policy is a joint exercise by the executive and

legislative branches, through treaties and statutes, and not a unilateral or exclusive authority of the president. With the war power, he looked solely to Congress—not to the president—for constitutional authority to take the country to war. He had no difficulty in identifying the branch that possessed the war power: “The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry.”¹⁸ When a presidential proclamation issued in time of war conflicted with a statute enacted by Congress, Marshall ruled that the statute prevails.¹⁹

Despite this clear meaning of Marshall’s use of “sole organ,” the Justice Department has repeatedly cited *Curtiss-Wright* as authority for inherent presidential power, as it did on January 19, 2006, in offering a legal defense for the National Security Agency surveillance program. The department associated the sole-organ doctrine with inherent power, pointing to “the President’s well-recognized inherent constitutional authority as commander in chief and sole organ for the Nation in foreign affairs.”²⁰ Later in this analysis, the department stated, “the President’s role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence.”²¹ Only by relying on the misconceptions of the dicta by Justice Sutherland in *Curtiss-Wright* could language like that be used. Nothing in Marshall’s speech offers any support for inherent or preeminent authority of the president.

USURPING THE WAR POWER

Beginning with President Harry S. Truman’s war against North Korea in 1950, presidents over the last half century have claimed the constitutional authority to take the country to war without seeking either a declaration of war or statutory authorization from Congress. Nothing is more destructive to the rule of law than allowing presidents to claim that the commander-in-chief clause empowers them to initiate war. With that single step, all other rights, freedoms, and procedural safeguards are diminished and sometimes extinguished.

The British model gave the king the absolute power to make war. The Framers repudiated that form of government, because their study of history convinced them that executives go to war not for the national interest but to satisfy personal desires of fame. The resulting military adventures were disastrous to their countries, both in lives lost and treasures squandered. John Jay warned in *Federalist* No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

Congress, and only Congress, is the branch of government authorized to decide whether to initiate war. That constitutional principle was bedrock to the Framers. They broke cleanly and crisply with the British model that allowed

kings to control everything abroad, including wars. The Framers created a Constitution dedicated to popular control through elected representatives. They dreaded placing the war power in the hands of a single person. They distrusted human nature, especially executives who leaned toward war. Contrary to the July 2008 Baker-Christopher war powers report, the Constitution is not “ambiguous” about placing the war power with Congress (see Fisher 2008c, 44–45; 2009; for testimony and other articles on the war power and War Powers Resolution, see http://www.loc.gov/law/help/usconlaw/constitutional_law.php).

At the Philadelphia Convention, only one delegate (Pierce Butler of South Carolina) was prepared to give the president the power to make war. He argued that the president “will have all the requisite qualities, and will not make war but when the Nation will support it.” Roger Sherman, a delegate from Connecticut, objected: “The Executive shd. be able to repel but not to commence war.” Elbridge Gerry of Massachusetts said that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason of Virginia spoke “agst giving the power of war to the Executive, because not (safely) to be trusted with it. . . . He was for clogging rather than facilitating war” (Farrand 1937, 2:318–19).

The debates at the Philadelphia Convention and the state ratification conventions underscore the principle that the president had certain defensive powers to repel sudden attacks, but anything of an offensive nature (taking the country from a state of peace to a state of war) was reserved to Congress. That understanding prevailed from 1789 to 1950, when President Truman went to war against North Korea without ever coming to Congress for authority.

The president is commander-in-chief, but that title was never intended to give the president sole power to initiate war and determine its scope. Such an interpretation would nullify the express powers given to Congress under Article I and undercut the Framers’ determination to place the power of war with the elected representatives of Congress. Eight clauses in Article I specifically define the military powers of Congress. Part of the purpose of the commander-in-chief clause is to preserve civilian supremacy. As explained by Attorney General Edward Bates, whatever soldier leads U.S. armies in battle, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”²² Military commitments are not in the hands of admirals and generals but are exercised by civilian leaders, including members of Congress. Lawmakers need to authorize military commitments and can, at any time, limit and terminate them.

SEEKING “AUTHORITY” FROM THE UNITED NATIONS

When President Truman went to war against North Korea, he claimed as “authority” two resolutions adopted by the United Nations (UN) Security Council. Nothing in the legislative history of the UN Charter justifies that interpretation. It is impossible to argue under the Constitution that the president and the Senate, through the treaty process, may create a procedure that allows

the president to circumvent Congress (including the House of Representatives) and obtain “authority” from an international or regional body.

During Senate action on the UN Charter, it was never contemplated that the president could use the Security Council as a substitute for Congress. All parties working on the charter recalled what had happened with the Versailles Treaty and the failure of the United States to join the League of Nations. President Woodrow Wilson opposed a series of Senate amendments to the treaty, including language requiring that Congress “shall by act of joint resolution” provide approval for any military action by the League (Fisher 2004, 82).

The need for advance approval by Congress for any military commitment was recognized by those who drafted the UN Charter (Fisher 2004, 84–87). In the midst of Senate debate on the charter, President Truman cabled from Potsdam his pledge to seek advance approval from Congress for any agreement he entered into with the UN for military operations: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them” (Fisher 2004, 91). Approval meant action by both Houses, and in advance. The Senate supported the charter with that understanding.

Each nation had to decide, consistent with its “constitutional processes,” how to implement the provision in the charter regarding the use of military force. To do that, Congress passed the United Nations Participation Act of 1945. Without the slightest ambiguity, Section 6 of that statute required that the use of the agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”²³ Yet five years later, without ever coming to Congress for authorization, Truman went to war against North Korea by relying on UN resolutions (Fisher 1995, 21; 2004, 97–104).

Truman’s action became a precedent for other presidents seeking “authority” from the UN for military initiatives, including President George H. W. Bush in 1990 (for Iraq) and President Bill Clinton in 1994 and 1995 (for Haiti and Bosnia). The unconstitutionality of using the UN Charter to bypass congressional control applies to other treaties, such as mutual security pacts. It was a violation of the Constitution for President Clinton, after failing to obtain Security Council support for the war in Kosovo, to use NATO for “authority.” No plausible argument can be made to require the president to seek the “approval” of each of the NATO countries but not from Congress (Fisher 1997, 1237).

INVOKING THE STATE SECRETS PRIVILEGE

Especially in recent years, the executive branch has invoked the “state secrets privilege” to prevent litigants from challenging actions that appear to be illegal and unconstitutional. These civil cases include the extraordinary rendition lawsuits of Maher Arar and Khaled El-Masri and the National Security Agency surveillance cases brought against the administration and telecoms. The rule of law is threatened if judges accept the standards of “deference” or “utmost deference” when evaluating executive claims. Assertions of “national

security” documents are only that: assertions. When judges fail to assert their independence in these cases, it is possible for an administration to violate statutes, treaties, and the Constitution without any effective challenge in court.

Congress has full authority to act legislatively to redress this problem. The House and the Senate have in the past year held hearings on this issue, and on August 1, 2008, the Senate Judiciary Committee reported its bill.²⁴ The Justice Department relies on the Supreme Court’s decision in *United States v. Reynolds* (1953), the first time the Court recognized the state secrets privilege. The history of that litigation makes plain that the executive branch misled the courts about the presence of “state secrets” in the document sought by the plaintiffs. When the document, a U.S. Air Force accident report, was declassified and made public, it was evident that the report contained no state secrets (Fisher 2006a).

SECRET LAW

Increasingly, the executive branch operates on the basis of secret executive orders, memoranda, directives, and legal memos. On March 31, 2008, the Bush administration declassified and released a Justice Department legal memo prepared five years earlier on military interrogation of alien unlawful combatants outside the United States. Other legal memos remain secret. A society cannot remain faithful to the rule of law when governed by secret law, especially policies that promote broad and unchecked presidential power. If legal memos contain sensitive information, items can be redacted and the balance of the document made public. No plausible case can be made for withholding legal reasoning. Secret policy means that the rule of law is not statute or treaty, enacted in public, but confidential executive policies unknown to citizens or even to members of Congress. The public and executive agencies cannot comply with secret law. Lawmakers are unable to review and amend legal interpretations never released by the executive branch.²⁵

ABUSE OF SIGNING STATEMENTS

A form of secret law appeared in a signing statement by President Bush on December 30, 2005. Congress, responding to criticism of abusive interrogations of detainees, passed legislation prohibiting cruel, inhuman, or degrading treatment or punishment of persons held in U.S. custody.²⁶ In signing the bill, President Bush stated that the provision would be interpreted “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief.”²⁷ References to the unitary executive theory and the commander-in-chief clause are far too general to understand either the nature of the objection or the scope of the claimed presidential authority. Other signing statements are generally impossible to comprehend and analyze because they are couched in such abstract references as the appointments clause, the presentment clause, the recommendations clause, and other shortcut citations.²⁸ Constitutional concerns

deepen when presidents raise objections at the time they sign a bill and proceed to adopt policies—as with the interrogation of detainees—unknown to the country or to Congress.

Signing statements encourage the belief that the law is not what Congress places in a bill but what presidents say about the language. In 1971, President Richard M. Nixon signed a bill that included a provision calling for the withdrawal of U.S. troops from Southeast Asia. The signing statement expressed the view that the provision “does not represent the policies of the Administration.”²⁹ A year later, a federal district court instructed President Nixon that the law was what he signed, not what he said about it.³⁰ When he signed the bill, it established U.S. policy “to the exclusion of any different executive or administration policy, and had binding force and effect on every officer of the Government, no matter what their private judgments on that policy, and illegalized the pursuit of an inconsistent executive or administration policy.”³¹ No executive statement, including that of the president, “denying efficacy to the legislation could have either validity or effect.”³²

“AUTHORIZING” WHAT IS ILLEGAL

To provide assurance to the public and other branches, administrations will often announce that what it has done is fully authorized. That pattern was illustrated when the Bush administration, having violated the FISA (Foreign Intelligence Surveillance Act) statute by not seeking approval from the FISA Court, publicly stated that its Terrorist Surveillance Program was “authorized,” regularly “reauthorized,” and was “legal” and “lawful.” Those words implied that the administration was acting in compliance with the rule of law, or “consistent” with the law, when it was in fact operating squarely against it and doing so in secret (Fisher 2008b, 291–98, 300–302). Justice Robert Jackson reminded us what is meant by the rule of law: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberation.”³³

OVERREACHING EXECUTIVE PRIVILEGE

In the past, the executive branch recognized that the president should not invoke executive privilege to defeat the rule of law. In particular, it was improper to block congressional access to information when “wrongdoing” had been committed by executive officials. The Supreme Court has noted that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”³⁴ Attorney General William Rogers told a Senate committee in 1958 that the withholding of documents from Congress “can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal, or pecuniary reasons.”³⁵ In 1982, Attorney General William French Smith said that he would not try “to shield [from Congress] documents which

contain evidence of criminal or unethical conduct by agency officials from proper review.”³⁶ During a news conference in 1983, President Ronald Reagan remarked, “We will never invoke executive privilege to cover up wrongdoing.”³⁷ In a memo of September 28, 1994, White House Counsel Lloyd Cutler stated that executive privilege would not be asserted with regard to communications “relating to investigations of personal wrongdoing by government officials,” either in judicial proceedings or in congressional investigations and hearings.³⁸

Those statements promote a basic principle. A privilege exerted by the executive branch should not be used to conceal corruption, criminal or unethical conduct, or wrongdoing by executive officials. A privilege should not be used to shield government officials who violate the law. Yet in the last two years, when Congress attempted to investigate several activities within the Justice Department, including the firings of U.S. attorneys, the administration decided that a privilege would protect top White House officials, both past and present. That interpretation provided those individuals with total immunity against any congressional investigation. Legislative efforts to exercise the power of contempt against those officials would be ineffective. Under this policy, the U.S. attorney, who is required under law to take a contempt citation to a grand jury to investigate possible wrongdoing, is prohibited from discharging that statutory duty. Through this policy, the investigative power of Congress to probe agency corruption is neutralized. Existing checks would come only from the executive department investigating itself.

On July 31, 2008, District Judge John D. Bates rejected a number of Justice Department arguments that were used to block the House contempt votes. Most importantly, he rejected the claim of absolute immunity from compelled congressional process for senior presidential aides. He found clear precedent and persuasive policy reasons to conclude that “the Executive cannot be the judge of its own privilege.”³⁹

This case did not concern matters of national security, an area where the executive branch frequently claims special and exclusive privileges to keep documents from Congress and the judiciary. The Justice Department relies heavily on the Supreme Court’s 1988 decision in *Egan*.⁴⁰ The Court acknowledged the president’s responsibilities to protect documents bearing on national security. Yet, as noted by District Judge Vaughn R. Walker in a recent ruling, the Court in *Egan* specifically said that presidential power is broad “unless Congress specifically has provided otherwise.”⁴¹ To Judge Walker, the Court’s decision in *Egan* “recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch.”⁴²

WATCH WHAT YOU INHERIT

Individuals elected to the presidency need to be wary of plans that have been developed by executive agencies during the previous administration and are placed before them, in the early weeks and months, urging quick action. An example is the 1952–53 covert operation to remove Prime Minister Mohammad Mosadegh

of Iran. The British and the American Central Intelligence Agency proposed to President Truman that he authorize the action, but Truman refused. When President Dwight D. Eisenhower entered the White House, he supported the plan and Mosadegh was subsequently removed and the Shah placed in power (Kinzer 2003). This U.S. intervention undermined the reputation of the United States as a country that supported democratic government and the rule of law. Toward the end of Eisenhower's eight years in government, another covert plan was readied and presented to the incoming president, John F. Kennedy. The plan was the "Bay of Pigs" invasion.

REVIVING STRUCTURAL CHECKS

The Framers did not depend solely on the presidency or federal courts to protect individual rights and liberties. They distrusted human nature and chose to place their faith in a system of checks and balances and separated powers. The rule of law finds protection when political power is not concentrated in a single branch and when all three branches exercise the powers assigned them, including the duty to resist encroachments of another branch. The rule of law is always at risk when Congress and the judiciary defer to claims and assertions by executive authorities. That is the lesson of the last two centuries and particularly of the past seven years.

James Madison looked to a political system in which ambition would counteract ambition. With Congress (and the judiciary), there is often a lack of ambition to assert institutional powers and duties. That invites executive initiatives at the expense of individual rights and constitutional values. Just as the Vietnam War helped spell defeat for the Democrats in 1968, so did the Korean War put an end to 20 years of Democratic control of the White House. "Korea, not crooks or Communists, was the major concern of the voters," wrote Stephen Ambrose (1983, 1:569). The Iraq War is widely seen as a major contribution to Republican losses in the 2006 and 2008 elections.

Although Eisenhower initially believed that Truman's decision to intervene in Korea was "wise and necessary" (Eisenhower 1963, 82), he came to realize that it was a serious mistake, politically and constitutionally, for a president to commit the nation to war without congressional support and approval. To Eisenhower, national commitments would be stronger if entered into jointly by both branches. Therefore, it was his practice to ask Congress for specific authority to deal with national security crises. He stressed the importance of *collective* action by the two branches: "I deem it necessary to seek the cooperation of the Congress. Only with that cooperation can we give the reassurance needed to deter aggression,"⁴³

In 1954, when Eisenhower was under pressure to intervene in Indochina, he refused to act unilaterally. He told reporters at a press conference, "There is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it. Now, let us have that clear; and that is the answer."⁴⁴ He told Secretary of State John Foster

Dulles that in “the absence of some kind of arrangement getting support of Congress,” it “would be completely unconstitutional & indefensible” to give any assistance to the French in Indochina.⁴⁵

Also in 1954, Eisenhower concluded that he lacked the authority to become involved militarily in the Formosa Straits. In a memorandum to Dulles, he observed that “It is doubtful that the issue can be exploited without congressional approval.”⁴⁶ One issue was whether Eisenhower could order an attack on airfields in China. He said that “to do that you would have to get congressional authorization, since it would be war. If congressional authorization were not obtained there would be logical grounds for impeachment. Whatever we do must be in a Constitutional manner.”⁴⁷ Sherman Adams, Eisenhower’s chief of staff, later recalled that Eisenhower was determined “not to resort to any kind of military action without the approval of Congress” (1961, 109).

In his memoirs, Eisenhower explained the choice between invoking executive prerogatives and seeking congressional support. On New Year’s Day 1957, he met with Secretary of State Dulles and congressional leaders of both parties. House majority leader John McCormack (D-MA) asked Eisenhower whether he, as commander in chief, already possessed sufficient authority to carry out military actions in the Middle East without congressional authority. Eisenhower replied that “greater effect could be had from a consensus of Executive and Legislative opinion, and I spoke earnestly of the desire of the Middle East countries to have reassurance now that the United States would stand ready to help. . . . Near the end of this meeting I reminded the legislators that the Constitution assumes that our two branches of government should get along together” (1965, 179).

During a press conference in 1957, President Eisenhower was asked whether he, as commander in chief, could send troops wherever he wanted without seeking the approval of Congress. Instead of identifying independent or inherent powers, he pointed to the practical importance of inter-branch collaboration.⁴⁸ Eisenhower understood that lawyers and policy advisors in the executive branch could always cite various precedents and authorities to justify unilateral presidential action. It was his judgment that a commitment by the United States would have much greater impact, on allies and enemies alike, if they represented the collective judgment of both branches.

ENDNOTES

1. After 9/11, the Bush administration met only with the “Gang of Eight” to reveal what became known as the “Terrorist Surveillance Program.” The Gang of Eight consists of four party leaders in the House and the Senate and the chair and ranking member of the two intelligence committees. The administration did not seek congressional approval until after the program had been disclosed by *The New York Times* in December 2005.
2. 12 Stat. 326 (1861). See also Fisher (2004, 47–49).
3. *United States v. Lopez*, 514 U.S. 549, 552 (1995).
4. *Boeme v. Flores*, 521 U.S. 507, 516 (1997).
5. *Merriam Webster’s Collegiate Dictionary*, 10th edition (1993), 601.
6. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936).

7. 48 Stat. 811, ch. 365 (1934).
8. 48 Stat. 1745 (1934).
9. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935).
10. *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230 (S.D. N.Y. 1936).
11. U.S. Justice Department, Statement as to Jurisdiction, *United States v. Curtiss-Wright*, No. 98, Supreme Court, October Term, 1936, at 7.
12. *Id.* at 15.
13. Brief for Appellees, *United States v. Curtiss-Wright*, No. 98, Supreme Court, October Term 1936, at 3.
14. Brief for Appellees Allard, *United States v. Curtiss-Wright*, No. 98, Supreme Court, October Term, 1936.
15. 299 U.S. at 320.
16. 10 *Annals of Cong.* 614 (1800).
17. 9 Stat. 320 (1846), upheld in *In Re Kaine*, 55 U.S. 103, 111–14 (1852).
18. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).
19. *Little v. Barrem*, 2 Cr. (6 U.S.) 170, 179 (1804).
20. Office of Legal Counsel, U.S. Department of Justice, “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,” January 19, 2006, at 1.
21. *Id.* at 30.
22. 10 Op. Atty Gen. 74, 79 (1861).
23. 59 Stat. 621, sec. 6 (1945).
24. S. Rept. No. 11–442, 110th Cong., 2nd sess. (2008).
25. The issue of secret legal memos was explored at a hearing on April 30, 2008, before the Senate Judiciary Committee. See also Fisher (2008d).
26. Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680, 2739 (2005), codified at 42 U.S.C.A. 2000dd (West. Supp. 2007).
27. 41 *Weekly Comp. Pres. Doc.* 1919 (2005); see also Bumiller (2006).
28. “Presidential Signing Statements,” Findings of the Subcommittee on Oversight and Investigations, House Armed Services Committee, August 18, 2008, available at <http://www.fas.org/sgp/congress/2008/signing.pdf>.
29. *Public Papers of the Presidents*, 1971, at 1114.
30. *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y. 1972).
31. *Id.* at 146.
32. *Id.* See also Fisher (2007c, 183).
33. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 655 (1952).
34. *Watkins v. United States*, 354 U.S. 178, 187 (1957).
35. “Freedom of Information and Secrecy in Government,” hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2nd sess. 5 (1958).
36. Letter of November 30, 1982, to Congressman John Dingell, reprinted in H. Rept. No. 698, 97th Cong., 2nd sess. 41 (1982).
37. *Public Papers of the Presidents*, 1983, I, at 239.
38. Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, “Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege,” September 28, 1994, at 1.
39. Committee on the Judiciary, *U.S. House of Representatives v. Harriet Miers*, Civil Action No. 08–0409 (JDB), (D.D.C. July 31, 2008), at 91.
40. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
41. *In re: National Security Agency Telecommunications Records Litigation*, MDL Docket No. 06–1791 VRW (D. Cal. July 2, 2008), at 22.
42. *Id.* For additional analysis of *Egan* and why Congress has access to sensitive and classified documents, see Fisher (2008a, 219). For example, *Egan* was a matter of statutory construction, not Constitutional interpretation.
43. *Public Papers of the Presidents*, 1957, at 11.

44. *Public Papers of the Presidents*, 1954, at 306.
45. Foreign Relations of the United States (FRUS), 1952–54, vol. 13, part 1, at 1242.
46. *Id.*, vol. 14, part 1, at 611.
47. *Id.* at 618.
48. *Public Papers of the Presidents*, 1957, at 177–78.

REFERENCES

- Adams, Sherman. 1961. *Firsthand Report: The Story of the Eisenhower Administration*. New York: Harper.
- Ambrose, Stephen E. 1983. *Eisenhower: Soldier, General of the Army*. 2 vols. New York: Simon & Schuster.
- Black, Henry Campbell. 1979. *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. 5th ed. St. Paul, MN: West.
- Bumiller, Elizabeth. 2006. "For President, Final Say on a Bill Sometimes Comes After the Signing." *The New York Times*, January 16, p. A11.
- Eisenhower, Dwight D. 1963. *Mandate for Change*. New York: Doubleday.
- . 1965. *The White House Years: Waging Peace, 1956–1961*. New York: Doubleday.
- Farrand, Max, ed. 1937. *Records of the Federal Convention of 1787*. 4 vols. New Haven, CT: Yale University Press.
- Fisher, Louis. 1995. "The Korean War: On What Legal Basis Did Truman Act?" *American Journal of International Law* 89 (January): 21–39.
- . 1997. "Sidestepping Congress: Presidents Acting Under the UN and NATO." *Case Western Reserve Law Review* 41: 1237–79.
- . 2004. *Presidential War Power*. 2nd ed. Lawrence: University Press of Kansas.
- . 2006a. *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*. Lawrence: University Press of Kansas.
- . 2006b. "The Sole Organ Doctrine." Studies on Presidential Power in Foreign Relations no. 1, Law Library of Congress. <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf> [accessed February 21, 2009].
- . 2007a. "Invoking Inherent Powers: A Primer." *Presidential Studies Quarterly* 37 (March): 1–22.
- . 2007b. "Presidential Inherent Power: The 'Sole Organ' Doctrine." *Presidential Studies Quarterly* 37 (March): 139–52.
- . 2007c. "Signing Statements: Constitutional and Practical Limits." *William & Mary Bill of Rights Journal* 16: 183–210.
- . 2008a. "Congressional Access to National Security Information." *Harvard Journal on Legislation* 45: 221–35.
- . 2008b. *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Lawrence: University Press of Kansas.
- . 2008c. "When the Shooting Starts: Not Even an Elite Commission Can Take Away Congress' Exclusive Power to Authorize War." *Legal Times*, July 28.
- . 2008d. "Why Classify Legal Memos?" *National Law Journal*, July 14.
- . 2009. "The Baker-Christopher War Powers Commission." *Presidential Studies Quarterly* 39 (March): 128–40.
- Kinzer, Stephen. 2003. *All the Shah's Men: An American Coup and the Roots of Middle East Terror*. Hoboken, NJ: Wiley.
- Patterson, C. Perry. 1944. "In re the *United States v. the Curtiss-Wright Corporation*." *Texas Law Review* 22: 286–308.

Reading 35

Deference and Defiance: The Shifting Rhythms of Executive- Legislative Relations in Foreign Policy

JAMES M. LINDSAY

The presidencies of Bill Clinton and George W. Bush contrast in many ways, perhaps no more so than in their divergent experiences in dealing with Congress on foreign policy. Clinton confronted a Congress that frequently sought to defy his initiatives and at times seemed to take glee in doing so. His list of defeats on Capitol Hill is long. Congress forced him to withdraw U.S. troops from Somalia in 1994. It slashed his foreign aid requests. It refused to grant him fast-track trade negotiating authority. It forced him to accept national missile defense and regime change in Iraq as goals of U.S. foreign policy even though he and many of his advisers doubted the wisdom and practicality of both. It blocked his efforts to pay U.S. back dues to the United Nations. The Senate rejected the Comprehensive Test Ban Treaty. Even when Congress backed Clinton on foreign policy, as with the dispatch of U.S. peace keepers to Bosnia and the Senate's approval of the Chemical Weapons Convention and NATO enlargement, the victories seemed to require inordinate administration effort.

Bush's experience was far different. Congress was eager to defer to his leadership on many foreign policy issues. It overwhelmingly authorized him to wage not one but two wars. It acceded to his decisions to leave the 1972 Anti-Ballistic Missile (ABM) Treaty and move to develop an expansive new national missile defense. It gave him most everything he requested for defense and foreign affairs spending. It embraced his request to begin the largest reorganization of the federal government in more than century. It gave him the trade-promotion (formerly fast-track) authority it had denied Clinton. Perhaps most significant, he had all Republicans and many Democrats rushing to tell voters that they supported his national security policies.

September 11 explains Congress's shift from defiance of Clinton to deference to Bush. The attacks on the World Trade Center and the Pentagon altered the American political landscape in the United States. Members of Congress who previously took pride in standing up to the White House suddenly saw the better part of good policy and good politics in a willingness to rally around the president.

The change that September 11 caused in executive-legislative relations was extreme but not unprecedented. The pendulum of power on foreign policy has shifted back and forth between Congress and the president

many times over the course of American history. The reason for this ebb and flow does not lie in the Constitution. Its formal allocation of foreign policy powers, which gives important authorities to both Congress and the president, has not changed since it was drafted. Rather, the answer lies in politics. How aggressively Congress exercises its foreign policy powers turns on the critical questions, of whether the country sees itself as threatened or secure and whether the president's policies are succeeding or failing. Simply put, times of peace and presidential missteps favor congressional defiance. Times of war and presidential success favor congressional deference.

THE CONSTITUTION AND FOREIGN POLICY

Ask most Americans who makes foreign policy in the United States and their immediate answer is the president. Up to a point, they are right. Even a cursory reading of the Constitution makes clear that Congress possesses extensive foreign policy powers. Article 1, Section 8 assigns Congress the power to "provide for the common Defence," "To regulate Commerce with foreign Nations," "To define and punish Piracies and Felonies committed on the high Seas," "To declare War," "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces." Article 2, Section 2 specifies that the Senate must give its advice and consent to all treaties and ambassadorial appointments. Congress' more general powers to appropriate all government funds and to confirm cabinet officials provide additional means to influence foreign policy.

The lesson in this is that when it comes to foreign affairs, Congress and the president *both* can claim ample constitutional authority. The two branches are, in Richard Neustadt's (1990, 29) oft-repeated formulation, "separated institutions *sharing* power." The question of which branch should prevail as a matter of principle when their powers conflict has been disputed ever since Alexander Hamilton and James Madison squared off two centuries ago in their famed *Pacificus-Helvidius* debate. Hamilton argued that the president was free to exercise his powers as he saw fit even if those actions might "affect the exercise of the power of the . . . legislature . . . : The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision" (Smith 1989, 52). Madison denied that there was such a thing as concurrent authority and insisted that the president could not exercise his authority in ways that would "abridge or affect" the enumerated powers of the legislature (Smith 1989, 56).

At the start of the 21st century, Hamilton's and Madison's intellectual descendants continue to spar, and they will undoubtedly continue to do so for years to come. Their battles often unleash the same passion they showed two hundred years ago. Yet, these battles are also largely academic, interesting intellectual exercises but seldom applicable to real world policy debates. The fact that the Constitution grants Congress extensive foreign policy powers means that most executive-legislative disputes do not raise constitutional

issues. They instead raise political issues and involve the exercise of political power. That is the insight behind Edward Corwin's oft-repeated observation that the Constitution is "an invitation to struggle for the privilege of directing American foreign policy" (Corwin 1957, 171).

To say that Congress can put its mark on foreign policy, however, is not the same as saying that it will try to do so. To understand why congressional activism on foreign policy varies over time, it is necessary to leave the realm of law and enter the realm of politics.

POLITICS AND FOREIGN POLICY

The first explanation for Congress's fluctuating say in foreign policy lies in an observation that Alexis de Tocqueville made more than 150 years ago. Surprised to find that the pre-Civil War Congress played a major role in foreign policy, he speculated that congressional activism stemmed from the country's isolation from external threat. "If the Union's existence were constantly menaced, and if its great interests were continually interwoven with those of other powerful nations, one would see the prestige of the executive growing, because of what was expected from it and of what it did" (de Tocqueville 1969, 126).

Why might threat perceptions affect how Congress behaves? When Americans believe they face few external threats—or think that international engagement could itself produce a threat—they see less merit in deferring to the White House on foreign policy and more merit to congressional activism. Debate and disagreement are not likely to pose significant costs; after all, the country is secure. When Americans believe the country faces an external threat, however, they quickly convert to the belief that the country needs strong presidential leadership. Congressional dissent that was previously acceptable suddenly looks to be unhelpful meddling at best and unpatriotic at worst. Members of Congress are no different than their constituents. They feel the same shifting sentiments toward the wisdom of deferring to the president. They are also profoundly aware that being on the wrong side of that shift could hurt them come the next election.

Throughout American history, power over foreign policy has flowed back and forth between the two ends of Pennsylvania Avenue according to this basic dynamic. In the second half of the 19th century, the United States was as secure from foreign attack as at any time in American history. This was also a time when Congress so dominated foreign policy that it has been called the era of "congressional government," "congressional supremacy," and "government-by-Congress." When the United States entered World War I, the pendulum of power swung to the White House. Woodrow Wilson experienced few congressional challenges during his war presidency. But once the war ended, Congress—and the Senate in particular—reasserted itself. Congressional activism persisted into the 1930s and even intensified. Convinced that America would be safe only as long as it kept out of Europe's political affairs, Congress's isolationist majority bitterly resisted any step President Franklin

Roosevelt tried to take that could involve the United States in the war brewing across the Atlantic.

Japan's bombing of Pearl Harbor punctured the isolationists' arguments and greatly expanded FDR's freedom to conduct foreign policy. He made virtually all of his major wartime decisions without reference to or input from Capitol Hill. When World War II ended, Congress began to reassert itself. Senior members of the House Foreign Affairs and Senate Foreign Relations Committees helped draft the United Nations Charter, the peace treaties for the Axis satellite states, and mutual security pacts such as the NATO Treaty.

But growing concerns about the Soviet Union slowed the shift of power away from the White House. As Americans became convinced in the late 1940s that hostile communist states threatened the United States and the rest of the free world, they increasingly came to agree on two basic ideas: The United States needed to resist communist expansion, and achieving this goal demanded strong presidential leadership. Most members of Congress shared these two basic beliefs (and helped promote them); those who disagreed risked punishment at the polls. The process became self-reinforcing. As more lawmakers stepped to the sidelines on defense and foreign policy over the course of the 1950s, others saw it as increasingly futile, not to mention dangerous politically, to continue to speak out. By 1960, the "imperial presidency," the flip side of a deferential Congress, was in full bloom (Schlesinger 1973). As one senator complained in 1965, members of Congress were responding to even the most far-reaching presidential decisions on foreign affairs by "stumbling over each other to see who can say 'yea' the quickest and loudest" (Sundquist 1981, 125).

The era of congressional deference to the imperial presidency came to a crashing halt with the souring of public opinion on the Vietnam War. Many Americans became convinced that communist revolutions in the third world posed no direct threat to core U.S. security interests, just as détente persuaded many that Leonid Brezhnev's Soviet Union posed less of a threat to core U.S. security interests. With the public more willing to question administration policies, so too were members of Congress. Many more had substantive disagreements with the White House over what constituted America's vital interests and how best to protect and advance them. Moreover, lawmakers had less to fear politically by the early 1970s in challenging the White House than they had only a few years earlier. Indeed, many calculated that challenging the president's foreign policies could actually help them at the ballot box by enabling them to stake out positions that their constituents favored. The result was a predictable surge in congressional activism.

Members of Congress did not always succeed in putting their stamp on foreign policy in the 1970s and 1980s. Knee-jerk support of the president was gone, but elements of congressional deference persisted among senior lawmakers (who had come of age during the era of congressional deference) and moderates (who worried that defeating the president could harm the country's credibility). Presidents from Richard Nixon through the elder George Bush often prevailed on major issues, because they could persuade these groups to

join them with a simple argument: The administration's policy might have shortcomings, but rejecting the president's request would damage his standing abroad, perhaps embolden Moscow to act more aggressively, and ultimately harm American interests. Yet the mere fact that the post-Vietnam presidents had to make this argument showed how much had changed from the days of the imperial presidency. Presidents Ford, Carter, and Reagan did not get the acquiescence from Capitol Hill that Presidents Eisenhower and Kennedy did.

Although perception of the external threat facing the country provides the primary impetus to the shifting pendulum of power along Pennsylvania Avenue, it is not the only one. A second, and interrelated, factor is how well the president's foreign policy initiatives work. Presidents such as Ronald Reagan who spend their political capital wisely and can show successes for their efforts can take power back from a Congress accustomed to flexing its muscles. In contrast, presidents who commit major foreign policy blunders, as Reagan did with Iran-Contra and Clinton did in Somalia, invite congressional challenges to their power. In that respect, John F. Kennedy's (1961 316–17) observation that “victory has 100 fathers and defeat is an orphan” is an iron law of the politics of foreign policy. In the extreme cases in which presidential decisions turn into historic debacles, as happened first with Lyndon Johnson and then with Richard Nixon in Vietnam, the result can be to change the very way Americans think about threats to their security and prosperity.

DEFIANCE REBORN

The end of the Cold War accelerated and exacerbated the trend toward greater congressional defiance that Vietnam triggered. With the Soviet Union relegated to the ash heap of history, most Americans looked abroad and saw no threat of similar magnitude on the horizon. When asked to name the most important problem facing the United States, polls in the 1990s rarely found that more than 5 percent of Americans named a foreign policy issue. That was a steep drop from the upward of 50 percent who named a foreign policy issue during the height of the Cold War. Moreover, many Americans had trouble identifying *any* foreign policy issue that worried them. One 1998 poll asked people to name “two or three of the biggest foreign-policy problems facing the United States today.” The most common response by far, at 21 percent, was “don't know” (Reilly 1999, 111).

These public attitudes meant that members of Congress who challenged the White House on foreign policy ran almost no electoral risks. With the public not caring enough to punish them for any excesses, lawmakers went busily about challenging Bill Clinton's foreign policy. In April 1999, for instance, during the Kosovo war, the House refused to vote to support the bombing. Not to be outdone, the Senate six months later voted down the test ban treaty even though President Clinton and 62 senators had asked that it be withdrawn from consideration. These episodes were major departures from past practice. When members of Congress had squared off against the White House in the latter half of the Cold War on issues such as Vietnam, the MX

missile, and aid to the Nicaraguan contras, they had vocal public support. On Kosovo and the test ban, however, few Americans were urging Congress to challenge Clinton. To the extent that they had opinions—and many did not—most Americans sided with the president.

Just as important, the once powerful argument that members of Congress should defer to the White House on key issues lest they harm broader American interests fell on deaf ears. In 1997, the Clinton administration sought to convince Congress to give it “fast-track” negotiating authority for international trade agreements. (With fast-track authority, Congress agrees to approve or reject any trade agreement the president negotiates without amendment. This simplifies trade negotiations because other countries do not have to worry that Congress will rewrite any trade deal.) When it became clear that he lacked the votes needed to prevail, President Clinton escalated the stakes by arguing that fast track was needed because “more than ever, our economic security is also the foundation of our national strategy” (Broder 1997, A1). The decision to recast a trade issue as a national security issue—a tried and true Cold War strategy—changed few minds, however. Recognizing defeat, Clinton asked congressional leaders to withdraw the bill from consideration, marking the first time in decades that a president had failed to persuade Congress to support a major trade initiative.

Besides encouraging members of Congress to flex their foreign policy muscles, the public’s diminished interest in foreign affairs after the collapse of the Soviet Union also encouraged them to cater to groups with narrow but intense preferences on foreign policy. It did so for two reasons. First, with most people focused on domestic concerns, interest groups constituted a major source of political profit or loss for politicians who did focus on foreign policy issues. Groups that had something to gain by influencing government policy became squeaky wheels, and they got the grease. Second, with the broad public looking elsewhere, the cost to members of Congress of tending to narrow interests dropped. Voters could not punish behavior they did not see.

The result of both these trends was that foreign policy in the 1990s increasingly became—to paraphrase the famed German military strategist Clausewitz—the continuation of domestic politics by other means. Lawmakers were more interested in how ethnic, business, and single-issue groups might help them win reelection and less whether the programs they championed added up to a coherent foreign policy. As former Representative Lee H. Hamilton (D-IN) put it: “Too many people place constituent interests above national interests. They don’t see much difference between lobbying for highway funds and slanting foreign policy toward a particular interest group” (Mufson 2000, A1). U.S. Ambassador Chas W. Freeman, Jr., put the same point somewhat differently, arguing that the 1990s represented “the franchising of foreign policy” to interest groups (Mufson 2000, A1).

Of course, interest group influence on U.S. foreign policy was nothing new. In 1773, a group of Bostonians banded together as the Sons of Liberty and protested the tax policies of the British crown by throwing the Boston Tea Party. In the 1950s, the “China Lobby” pressed for greater support for

Nationalist China. In the 1970s, human rights groups pushed for human rights legislation, and in the 1980s, steel companies and automobile manufacturers demanded protection against lower-cost foreign imports. Interest groups are so much a part of American politics that the United States is in practice “the interest group society” (Berry 1989).

What changed in the 1990s was that the countervailing push from broader interests weakened and the grip that interest groups had on their policy issues became firmer. During the Cold War, the consensus that surrounded containment helped keep narrow interests in check. Demands for particular policies had to be and usually were balanced against broader strategic considerations. At the same time, with the mass public more worried about foreign affairs, members of Congress were more cautious about indulging interest groups, especially when the executive branch objected. That reluctance eroded with the disappearance of the Soviet Union. Deference to presidential wishes decreased, because fewer lawmakers saw reason to forego rewards from interest groups simply because congressional activism made an administration’s job harder.

A case in point was the House of Representative’s effort in 2000 to pass a nonbinding resolution labeling the massacres of Armenians that occurred in the Ottoman Empire from 1915 to 1923 as “genocide.” Representative James Rogan (R-CA) sponsored the resolution. He made no claim to be a foreign policy expert—none of his committee assignments dealt with foreign policy, and he had traveled outside the United States only once in his life—but he was caught in a tight reelection race. And his congressional district happened to have the highest concentration of Armenian-Americans of any district in the United States. The resolution offered an easy way to build goodwill with constituents by promoting a cause they held dear. The Armenian Assembly of America, which routinely grades how members of Congress vote on issues affecting Armenia, had long lobbied for the resolution.

In another time, Rogan’s resolution would have languished in committee. Party leaders would have allowed him to introduce the bill—enabling him to gain political credit with his constituents for “fighting the good fight”—but kept the bill from advancing—thereby protecting the country’s broader interests. But in 2000, House Republican leaders, eager to maintain their slim majority in the face of potential Democratic inroads in the upcoming elections, embraced the bill. Speaker of the House J. Dennis Hastert (R-IL) promised Rogan that he would bring the resolution to a vote on the House floor. He personally placed the measure on the House legislative calendar. The House International Relations Committee subsequently approved it by a large margin.

As Rogan, Hastert, and other House members pushed the genocide resolution forward, they gave little thought to the consequences their symbolic gesture would have on broader U.S. interests. The result was escalating tensions with Turkey, a major American ally that, among other things, allowed U.S. and British fighter planes to use Incirlik Air Base to patrol the skies over northern Iraq. Turkey’s president expressed “grave reservations” about the resolution, repeating his country’s longstanding insistence that there had been

no genocide (Mufson 2000, A1). Suddenly, U.S. defense companies faced the possibility that they might lose sales to Turkey and the Pentagon the possibility that it would lose the right to fly out of Incirlik. After a barrage of phone calls from Bill Clinton, other administration officials, and senior military officers warning that the resolution would significantly harm U.S. foreign policy, Hastert agreed to put off a vote on Rogan's bill.

THE DEFERENTIAL CONGRESS RETURNS

Congress' defiance of Bill Clinton in the first post-Cold War decade rested on the public's belief that what happened outside America's borders mattered little in their lives. September 11 punctured that illusion and ended America's decade-long "holiday from history" (Krauthammer 2001, 156). Foreign policy suddenly became a top priority with the public. Not surprisingly, the pendulum of power swung sharply back toward the White House.

"Rally Round the Flag"

Bush speechwriter David Frum (2003, 272) was probably not far off the mark when he wrote that "on September 10, 2001, George Bush was not on his way to a very successful presidency." The economy had slumped, corporate accounting scandals led the evening news, and the administration's unilateralist actions abroad on issues ranging from the Kyoto Treaty on global warming to the International Criminal Court had angered friends and allies abroad. Polls taken in early September 2001 showed that Bush's public approval rating stood at only 51 percent. With the exception of Gerald Ford, who saw his popularity plummet in the wake of his decision to pardon Richard Nixon, no president had enjoyed such low ratings during his first eight months in office (Smith 2002, 44).

The impact of September 11 on American public opinion was dramatic. President Bush's approval ratings in the Gallup Poll soared to 90 percent—a figure seen only once before when his father waged the Gulf War. Although the elder Bush's approval ratings quickly returned to their pre-war levels, the younger Bush's remained high for months. On the one-year anniversary of the terrorist attacks, his approval rating stood at 70 percent (Jones 2003). Gallup found that two out of every three Americans named terrorism, national security, or war as the most important problem facing the United States. Foreign policy had reached this level of political salience only twice since the advent of scientific polling—during the early stages of both the Korean and Vietnam wars (Gallup Organization 2001). Equally important, Americans did not react to the attacks by seeking to withdraw from the world. Quite the opposite. In November 2001, 81 percent of those polled agreed that it would be "best for the future of the country if we can take an active part in world affairs" (Program on International Policy Attitudes, 2001). This marked the highest percentage favoring active engagement in the more than the half century that the question had been asked (Lindsay 2003, 43, 53).

The public rallied around Congress as well as the president—public approval of the way Congress was carrying out its job doubled from 42 percent in early September to 84 percent in early October (Smith 2002, 45). Nonetheless, the political benefits of the rally flowed to the White House and not Capitol Hill. The main reason was that the country was not split on what the government should do—as was the case, for example, during the later years of Vietnam—but remarkably unified. Bush was further helped by the fact that Democrats were in an especially weak political position to oppose any decision he might make about how to respond to the attacks. Polls had shown since the early 1970s that the American public had decidedly more confidence in the ability of Republicans to handle foreign affairs than Democrats. That left any Democrats disposed to criticize administration policy leery of being accused of being unpatriotic and skeptical that the American public was ready to listen to any criticism.

Republicans recognized the Democrats' vulnerability on this point and exploited it. The most telling incident came in February 2002. Senate Majority Leader Tom Daschle (D-SD) told reporters that he believed the war on terrorism "has been successful" but that he worried that the administration's efforts to expand the war lacked "a clear direction" (Purdum 2002, A1). The Republican rebuttal was swift and unyielding. Senate Minority Leader Trent Lott (R-MS) complained: "How dare Senator Daschle criticize President Bush while we are fighting our war on terrorism, especially when we have troops in the field? He should not be trying to divide our country while we are united." House Majority Whip Tom DeLay (R-TX) issued a one-word press release calling Daschle's comments "disgusting." Representative Tom Davis (R-VA), chairman of the National Republican Congressional Campaign Committee, accused Daschle of "giving aid and comfort to our enemies," which happens to be the legal definition of treason (Dewar 2002, A6). Few of Daschle's Democratic colleagues came to his defense.

Early Actions

The shift in political power from Capitol Hill to the White House was evident immediately. On September 14, 2001, after little debate about the consequences of what they were about to do, all but one member of Congress voted to give the president authority to retaliate against those responsible. The resolution was stunning in the breadth of authority it granted. It stated that the president could "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." In short, Congress effectively declared war and left it up to President Bush to decide who the enemy was.

The new congressional deference manifested itself quickly on other issues as well. In 1997, the Clinton administration had struck a deal with Senators Jesse Helms (R-NC) and Joseph Biden (D-DE), the chair and ranking member of the Senate Foreign Relations Committee, to pay most (but not all) of the

back dues the United States owed to the United Nations. Efforts to appropriate all the funds needed to carry out the so-called Helms-Biden law, however, bogged down in the House. Many House Republicans were deeply skeptical of the value of the United Nations, and some representatives used the bill in an attempt to force changes in the Clinton administration's policy on the International Criminal Court and assistance to family planning organizations.

The Bush administration had taken up the cause of Helms-Biden when it assumed office. As of early September 2001, however, it had little to show for its efforts. Once the attacks on the World Trade Center and the Pentagon occurred and it became essential to build a multinational coalition to prosecute the war on terrorism, the White House found Congress much more receptive to its arguments. House leaders quickly agreed to work for passage of a stand-alone bill providing the necessary funding. They placed it on the suspension calendar, which limited debate but also required a two-thirds majority vote to pass. The bill, which the Senate had passed in February 2001, cleared on a voice vote (Pomper 2001b, 2276).

The Bush White House also tackled another previously hot issue—sanctions on Pakistan. Islamabad had triggered one set of sanctions with its May 1998 nuclear tests. U.S. law required the imposition of another set of sanctions in response to General Pervez Musharraf's overthrow of Pakistan's democratically elected government in October 1999. The Clinton administration recognized that these sanctions did not necessarily serve U.S. interests. However, persuading Congress to accept that judgment was another matter entirely. In the 1990s, congressional sentiment had tilted sharply in favor of Pakistan's rival India. More than 100 lawmakers belonged to the Congressional Indian Caucus, and the Clinton administration decided not to expend its limited foreign policy capital invoking a provision in the law that allowed the president to waive the sanctions imposed in response to the nuclear tests. Immediately after the September 11 attacks, however, President Bush exercised waiver as part of his effort to ensure Pakistani support for the war on terrorism and military action against Afghanistan. In mid-October, Congress passed legislation authorizing him to waive the other sanctions that had been placed on Islamabad (Pomper 2001a, 2487).

One issue that saw congressional Democrats reverse themselves was national missile defense. Throughout the spring and summer of 2001, they had regularly criticized the administration for suggesting that it was preparing to withdraw the United States from the ABM Treaty. They argued that destroying what they called the "cornerstone of international stability" so that the Pentagon could test unproven defensive technologies was reckless at best. Many Democrats also concluded that opposing the Bush administration's missile defense plans would be politically rewarding. They believed that their decision to oppose Ronald Reagan's Strategic Defense Initiative in the 1980s had been politically profitable, and they hoped to reprise that success.

Democrats had one strong card to play in this debate—their control of the Senate. Senator Carl Levin (D-MI) used his prerogative as chair of the Senate Armed Services Committee to insert a provision in the fiscal year 2002

defense authorization bill that would have cut \$1.3 billion of the \$8.3 billion the administration had requested for missile defense and prohibited the Defense Department from conducting any anti-missile test that violated the ABM Treaty. The committee sustained his “chairman’s mark” on a straight-line party vote. A “fierce Senate showdown” looked to be in the offing (Towell 2001, 2079). In the wake of September 11, however, Senate Democrats stripped the authorization bill of the testing provision and restored nearly all the funding the White House had requested. (A small amount was shifted to counterterrorism accounts.) In December 2001, President Bush announced the U.S. withdrawal from the ABM Treaty. The decision passed without much comment on Capitol Hill.

Just weeks before the ABM withdrawal announcement, the White House issued the Military Order of November 13 (Bush 2001). It declared that the foreign citizens the United States detained while waging its war on terrorism could be tried before military commissions. The order offended many civil libertarians and prompted more than 300 law professors to sign a letter calling the commissions “legally deficient, unnecessary, and unwise” (Seelye 2001, B7). The order presumably implicated Congress’s constitutional authority to “define and punish . . . offenses against the law of nations” and its power to make all other laws “necessary and proper” for executing the federal government enumerated power (Tribe 2001). Still, Congress neither rejected the president’s decision nor acted to reinforce its legal basis. Even lawmakers who strongly endorsed the idea, such as former vice presidential candidate Senator Joseph Lieberman (D-CT), saw no need for congressional action. Those lawmakers who doubted the wisdom of the military commission idea, or who worried that it might have consequences for the civil liberties of American citizens, were either few in number or remarkably quiet. Little changed when the Justice Department turned Jose Padilla, a suspected American-born member of al Qaeda, over to the Defense Department to be held as an enemy combatant.¹ Few members wanted to be seen sympathizing with an alleged terrorist and criticizing a very popular president.

FROM TORA BORA TO BAGHDAD

President Bush’s dominance of foreign affairs continued into 2002. In February 2002, he proposed increasing the defense budget by \$48 billion. It was the largest requested increase in real dollars in defense spending since the early years of the Reagan buildup—and a sum roughly equal to China’s total defense budget. The request elicited few complaints from Congress, even though the bulk of the spending increase was targeted at funding defense programs that had been on the drawing boards for years rather than to meet new needs created by the war on terrorism. Congress did make technical adjustments that cut slightly more than \$1 billion in funding. It also stripped out a provision to create a \$10 billion contingency fund that the Pentagon could have used as it saw fit; even deferential lawmakers were reluctant to give the Defense Department that much walking around money. Nonetheless, they signaled that they would be receptive to any specific funding requests that the Pentagon might

submit. The eventual FY 2003 appropriation increased defense spending by nearly \$37 billion, or a sum equal to Great Britain's entire military budget.

While President Bush was riding high in the polls in early 2003, some Democrats were deeply disappointed with what they saw as his failure to prepare the federal government to handle counterterrorism efforts. Bush initially responded to September 11 by creating a new Office of Homeland Security in the White House. Critics led by Senator Lieberman recommended going further and proposed establishing of a new Cabinet department of homeland security. They argued that putting the major agencies responsible for homeland security under one roof would make it easier to coordinate their activities and thereby improve the country's security. What was probably not lost on many Democratic proponents of reorganization was that it enabled them to criticize the president from the right, a politically safe vantage point for a party thought to be weak on security issues. They could argue that the White House was not doing enough to protect Americans from the threat posed by al Qaeda and similarly inspired terrorists.

The Bush administration resisted the idea of a new Cabinet department for months. In March 2002, Ari Fleisher (2002), the White House spokesman, said that "creating a cabinet department doesn't solve anything." Other administration officials argued that reorganization would make Americans less secure, because it would divert Washington's resources and focus away from the war on terrorism. The White House also knew that many congressional Republicans were at best lukewarm toward the idea of a new Cabinet department. They believed reorganization would produce a bigger, more costly, more intrusive federal government—precisely what they had fought for years to prevent.

On June 6, President Bush surprised the country by announcing on nationwide television that he wanted to create a new Department of Homeland Security (DHS). It was doubly surprising that his reorganization plan dwarfed anything being considered on Capitol Hill. It proposed merging 22 agencies, employing nearly 170,000 workers and spending more than \$35 billion annually. To top it all off, the president wanted Congress to pass the legislation authorizing the reorganization—which would be the most ambitious and complex government reshuffling since the creation of the Department of Defense in 1947—by the end of the year.

The White House insisted that the change of view reflected the merits of the argument for reorganization. Democrats argued that it reflected politics. In mid-May, the Senate Governmental Affairs Committee, which Senator Lieberman chaired, had approved a reorganization bill. The legislation had picked up a few Republican supporters. Even if the administration's allies on Capitol Hill succeeded in blocking the bill, however, the administration risked giving its critics an issue with which to attack the president. To make matters worse, at the same time that reorganization was picking up political steam, the administration was being buffeted by a string of news stories that questioned its competence in the weeks leading up to September 11. Reporters had uncovered evidence that miscommunication and squabbling between and within the CIA and FBI had contributed to the government's failure to uncover the

terrorist plot. Indeed, President Bush announced his reorganization proposal the night before FBI agent Coleen Rowley was scheduled to give her much-awaited congressional testimony on how FBI headquarters had failed to pursue possible leads that might have uncovered the September 11 plot.

Whatever the motives behind the reorganization proposal, most members of Congress found it hard to oppose. Many congressional Republicans continued to dislike the idea, and Bush (2002c) had sought to defuse objection in announcing the plan by insisting that “by ending duplication and overlap, we will spend less on overhead, and more on protecting America.” Even though experts dismissed the president’s claim as unrealistic, most Republicans recognized that political necessity dictated that they support their party’s leader. Democrats faced a different problem. After demanding the creation of a homeland security department for months they could not suddenly denounce it as a bad idea. Democrats could only applaud the president’s change-of-heart and hope that voters remembered it had been a Democratic idea first. Richard Gephardt (D-MO), the leader of the House minority leader, went even further. He tried to top Bush’s announcement by committing Democrats to passing a reorganization bill by the first anniversary of the September 11 attacks.

Congress ultimately failed to meet Gephardt’s deadline but not because of disagreement over the substance of the reorganization. Numerous experts weighed in on the shortcomings of the administration’s plan, and individual committee chairs took issue with aspects of the reorganization that affected agencies under their jurisdiction (Daalder et al. 2002; Williams and Nather 2002). Nonetheless, House and Senate leaders were determined to act quickly, and they quashed any potential revolts. By early August, each chamber had prepared legislation that reflected the basic outlines of the department the White House wanted to create.

This seemingly unstoppable legislative locomotive suddenly derailed, however, but not over the matter of which agencies would not be folded into the new organization or what authorities it would wield. Instead, the stumbling block was the question of how many of the civil service protections that they previously enjoyed would be taken from workers in the new department. Democrats saw the proposal as a domestic political issue that threatened the interests of a key Democratic constituency: organized labor. They calculated that opposing the White House’s request for maximum flexibility would mobilize union supporters and benefit Democratic candidates in the November midterm elections. Republicans, by contrast, calculated that the public would see the dispute as a national security issue and punish the Democrats for being willing to narrow interests ahead of the broad public interest. The results on Election Day bore out the arguments of Republican strategists. In mid-November a lame-duck Congress passed legislation creating a new homeland security department largely along the lines of what President Bush had proposed.

As the dispute between Democrats and Republicans over civil service protections for DHS workers built up steam in late summer 2002, so too did suspicions that President Bush intended to go to war with Iraq. In his January 29, 2002 State of the Union Speech, Bush (2002b) had named Iraq, Iran, and

North Korea as members of an "axis of evil, arming to threaten the peace of the world." He went on to declare that "time is not on our side. I will not wait on events, while dangers gather." He and his aides subsequently ruled out using military force to deal with the threats from Iran and North Korea. They gave no such reassurances about U.S. dealings with Iraq. Concerns that Bush (2002a) was planning to attack Iraq grew after he declared in his June 1, 2002 commencement address at West Point that Americans must "be ready for pre-emptive action," and his senior aides talked openly of the need for regime change in Iraq.

The administration's threats to overthrow Saddam Hussein prompted calls for members of Congress to speak to the possibility of war. The Senate Foreign Relations Committee held its first hearings on the topic at the end of July. Over the next several weeks, lawmakers from both parties began arguing that the administration could not take the country to war without congressional approval. The White House's initial response was that the 1991 Gulf War resolution, the September 11 resolution, and the president's inherent powers as commander in chief made that step unnecessary. But in early September, the White House relented and sent to Capitol Hill a draft use-of-force resolution that would have given the president nearly unbounded power. The decision to reverse course was easy to make. Administration officials recognized that Congress was virtually certain to grant its request. If Democrats decided to vote against a use-of-force resolution, Republicans could use that against them in the midterm elections.

The administration's calculations proved correct. Democratic attempts to postpone the vote until after the elections failed. Senate Majority Leader Daschle's fallback position was to substitute a restrictive resolution for the open-ended one the White House had proposed. That strategy collapsed, however, when House Minority Leader Gephardt broke ranks. He met privately with the president and agreed to support a slightly modified version of the White House proposal. Other lawmakers quickly abandoned their efforts to craft alternative resolutions. In early October, both the House and Senate voted overwhelmingly to authorize the president to go to war.

The resolution that Congress passed differed in a few ways from the one the White House initially proposed. The final resolution dropped the most egregious provision in the original, which would have authorized the president "to use all means that he determines to be appropriate" to "restore international peace and security in the region." The final resolution also contained greatly expanded language detailing the horrors of Saddam Hussein's rule, and it imposed reporting requirements on the White House. Nonetheless, the thrust of the operative paragraph remained the same: The president could take the country to war as he saw fit. In that respect, the October 2002 Iraq War resolution is unique in American history. Congress authorized the president to wage a war that he had not yet decided (at least publicly) to fight.²

When asked why Democrats had not done more to oppose a resolution so many of them thought unwise, Senate Majority Leader Daschle wearily replied: "The bottom line is . . . we want to move on" (Rich 2002, A21).

Congress's eagerness to delegate its war power to the president drew the ire of Senator Robert Byrd (D-WV), a veteran of five decades of service on Capitol Hill. "How have we gotten to this low point in the history of Congress? Are we too feeble to resist the demand of a president who is determined to bend the collective will of Congress to his will?" (Byrd 2002, A39).

THE LIMITS TO THE DEFERENTIAL CONGRESS

The return of the deferential Congress after September 11 did not carry over to all policy issues or even all foreign policy issues. As the debate over civil service protections for employees in the Department of Homeland Security showed, on some issues lawmakers conducted themselves as they had before September 11. As a general rule, the willingness of members to defy the president varied directly with the threat his policies posed to the tangible interests of their constituents.

The limits of Congress's willingness to defer to the White House were evident in domestic policy. Despite Bush's soaring poll numbers in late 2001 and early 2002, Democrats felt safe blocking his economic stimulus plan. Despite administration insistence that national security considerations made it imperative to find new energy sources in the United States, the Senate defeated a bill to open up the Arctic National Wildlife Reserve to oil exploration. Senate Democrats also used their majority status to block votes on federal judicial nominees they deemed to be too conservative. In these and other cases, "normal" politics prevailed, because the issues mattered to key constituencies and the argument that opposing the president's position would harm the war on terrorism struck most people as strained at best.

Congress's efforts to question and revise presidential initiatives could also be seen on other issues more closely linked to the war on terrorism. Immediately following September 11, the White House submitted legislation that eventually became the USA Patriot Act. The bill proposed numerous changes to the rules governing surveillance and intelligence activities. Many of the proposed changes had been discussed for years but never enacted, because the issue had never been urgent enough to overcome legislative inertia. Other proposed changes, however, went beyond anything that had been discussed before the terrorist attacks and had tremendous potential consequences for individual privacy and other civil liberties. Although Congress accommodated the White House's insistence that it move quickly on the legislation—it was on the president's desk five weeks after September 11—lawmakers made a significant change. They stipulated that its most controversial provisions would expire in 2005 unless Congress voted to renew them. The push to insert these sunset provisions came from civil libertarians in both parties who both responded to and encouraged public fears that the Patriot Act otherwise went too far in curtailing individual freedoms (Bettelheim and Palmer 2001).

The Bush White House encountered even stiffer resistance on the trade front. Despite the backdrop of September 11 and despite the fact that Republicans were the majority party in the House, the House passed legislation

giving the president trade-promotion authority by only a single vote. Even that victory came only after the administration promised to roll back some of the access to American textile markets that previous trade legislation had given to Caribbean and Central American countries. The White House also promised that any assistance given to Pakistan for its participation in the war on terrorism would be designed "to minimize the impact on the U.S. textile and apparel industry" (Faler 2002, 45). The administration subsequently backed away from its promise to Islamabad to allow Pakistani apparel exports greater access to the U.S. market (Brainard 2001, A19).

The Senate did not vote on the trade-promotion authority bill until July. That vote took place only after Democrats forced Republicans to increase spending on Trade Adjustment Assistance programs designed to help workers who lose their jobs because of foreign competition by \$12 billion. The House passed the conference report on the trade-promotion bill only after Republican leaders suppressed several revolts against its provisions. The lesson in the trade debate was clear: Lawmakers were willing to defer to the White House on issues of war and peace but not on issues that directly affected the livelihood of their constituents.

CONCLUSION

Congress's shifting deference to and defiance of presidential leadership in foreign affairs reflects a political dynamic that stretches back to the beginnings of the American republic. Lawmakers are willing to assert their constitutional prerogatives when they believe the United States has little to worry about abroad or the president's proposed course of action threatens to imperil American security. Conversely, when threats are clear and presidential decisions have produced success rather than failure, both politics and a sense of good policy encourage members of Congress to rally 'round the flag.

It is impossible to say how long the current era of congressional deference will last. Unlike domestic policy, in which critics have strong political incentives to criticize the White House, the political winds at the start of April 2003 blew briskly in the opposite direction. A sustained period of peace could change those calculations, but that hardly seemed to be in the offing. The country was at war with Iraq, al Qaeda's most senior leaders remained on the loose, and a confrontation over North Korea's nuclear program threatened to escalate.

The greater threat to the imperial presidency seemed to come then from the opposite direction—the threat of executive overreaching. In deciding to wage war on Iraq, President Bush took a strategic gamble of potentially historic proportions. He vowed not just to unseat a ruthless dictator and destroy his weapons of mass destruction but also to bring democracy to the Iraqi people and to the Middle East. Should the war be far bloodier and costlier than the American public is willing to tolerate, or perhaps more likely, should the military occupation needed to win the peace begin to look like the U.S. peacekeeping mission in Lebanon in 1983, the political winds could quickly reverse. In that event, President Bush would discover what President Johnson

learned more than three decades ago: Although members of Congress defer to the White House when foreign policy takes off, that does not mean they will be deferential when it crashes.

ENDNOTES

1. The military commission order explicitly applies only to foreign citizens. Padilla's ultimate legal fate was undetermined as of March 2003.
2. The founders rejected the notion that Congress could, or should, give such contingent authority to the president (Schlesinger 1973, 26–29).

REFERENCES

- Berry, Jeffrey M. 1989. *The Interest Group Society*, 2d ed. Glenview, Ill.: Scott, Foreman/Little, Brown.
- Bettelheim, Adriel, and Elizabeth A. Palmer. 2001. "Balancing Liberty and Security," *CQ Weekly Report*. 59:2210–13.
- Brainard, Lael. 2001. "Textiles and Terrorism," *The New York Times*. December 27.
- Broder, John M. 1997. "House Postpones Trade-Issue Vote," *The New York Times*. November 8.
- Bush, George W. 2001. "President Issues Military Order," The White House. November 13. Available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.
- Bush, George W. 2002a. "President Bush Delivers Graduation Speech at West Point," The White House. June 1. Available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.
- Bush, George W. 2002b. "President Delivers State of the Union Address," The White House. January 29. Available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.
- Bush, George W. 2002c. "Remarks by the President in Address to the Nation," The White House. June 6. Available at <http://www.whitehouse.gov/news/releases/2002/06/20020606-8.html>.
- Byrd, Robert C. 2002. "Congress Must Resist the Rush to War," *The New York Times*. October 10.
- Corwin, Edward S. 1957. *The President: Office and Powers, 1787–1957*, 4th rev. ed. New York: New York University Press.
- Daalder, Ivo H., et al. 2002. "Assessing the Department of Homeland Security," Brookings Institution, Washington, DC, July 15. Available at <http://www.brook.edu/dybdocroot/fp/projects/homeland/assessdhs.pdf>.
- De Tocqueville, Alexis. 1969. *Democracy in America*. New York: Anchor Books.
- Dewar, Helen. "Lott Calls Daschle Divisive," *The Washington Post*. March 1.
- Faler, Brian. 2002. "Jobs in Pakistan or North Carolina?" *National Journal*. 50:44–45.
- Fleisher, Ari. 2002. "Press Briefing," White House. Office of the Press Secretary. March 19. Available at <http://www.whitehouse.gov/news/releases/2002/03/20020319-7.html>.
- Frum, David. 2003. *The Right Man*. New York: Random House.
- Gallup Organization. 2001. "Terrorism Reaches Status of Korean and Vietnam Wars as Most Important Problem," November 19.
- Jones, Jeffrey M. 2003. "Latest Update Shows No Change in Support for Invasion of Iraq," Gallup Poll, March 7.
- Kennedy, John F. *Public Papers of the Presidents: 1961*. Washington, DC: U.S. GPO.
- Krauthammer, Charles. 2001. "The Hundred Days," *Time*. December 31.
- Lindsay, James M. 2003. "Apathy, Interest, and the Politics of American Foreign Policy," *The Uncertain Superpower: Domestic Dimensions of U.S. Foreign Policy after the Cold War*, ed. Bernhard May and Michaela Honicke Moore. Berlin: Leske & Budrich.
- Mufson, Steven. 2000. "Local Politics Is Global as Hill Turns to Armenia," *The Washington Post*. October 9.
- Neustadt, Richard E. 1990. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press.
- Pomper, Miles A. 2001a. "Bill to Waive Pakistan Sanctions Clears over Protests from Appropriators and Supporters of India," *CQ Weekly Report*. 59:2487.

- Pomper, Miles A. 2001b. "House Clears Payment of Debt to U.N. as Anti-Terrorism Effort Takes Priority," *CQ Weekly Report*. 59:2276.
- Program on International Policy Attitudes. 2001. "Americans on the War on Terrorism: A Study of US Public Attitudes," November 6. Available at <http://www.pipa.org/OnlineReports/Terrorism/WarOnTerr.html>.
- Purdum, Todd. 2002. "Democrats Starting to Fault President on the War's Future," *The New York Times*. March 1.
- Reilly, John E. 1999. "Americans and the World: A Survey at Century's End," *Foreign Policy* 114:97–114.
- Rich, Frank. 2002. "It's the War, Stupid," *The New York Times*. October 12.
- Schlesinger, Arthur, M., Jr. 1973. *The Imperial Presidency*. Boston: Houghton Mifflin.
- Seelye, Katharine Q. "A Nation Challenged: The Military Tribunals," *The New York Times*. December 8.
- Smith, Eric R.A.N. 2002. "Who Benefits? Public Opinion, Partisan Politics, and the Consequences of September 11," In *American Politics after September 11*, ed. James M. Lindsay. Cincinnati: Atomic Dog Publishing.
- Smith, Jean E. 1989. *The Constitution and American Foreign Policy*. St. Paul: West Publishing.
- Sundquist, James L. 1981. *The Decline and Resurgence of Congress*. Washington, DC: Brookings Institution Press.
- Towell, Pat. 2001. "Armed Services Democrats' Move to Shackle Anti-Missile Program Sets up Fierce Senate Showdown," *CQ Weekly Report* 59: 2079–80.
- Tribe, Laurence H. 2001. "Trial by Fury," *New Republic*. December 10.
- Williams, Bob, and David Nather. 2002. "Homeland Security Debate: Balancing Swift and Sure," *CQ Weekly Report*. 60:1642–48.

Reading 36

Constraining Executive Power: George W. Bush and the Constitution

JAMES P. PFIFFNER

The modern tradition of constraining the power of political executives has deep roots in Anglo-American governmental traditions. Magna Carta of 1215, the Habeas Corpus Act of 1679, the English Bill of Rights of 1689, the Common Law, and other documents and traditions of the British Constitution all provided precedents upon which the Framers of the U.S. Constitution drew. From the ratification of the U.S. Constitution to contemporary times, the experience and precedents of the presidency have also played an important role in laying the basis for the legitimate authority exercised by the president in the constitutional system. This article will examine several actions of President George W. Bush and argue that he has made exceptional claims to presidential authority. Four instances of President Bush's claims to presidential power will be examined: his suspension of the Geneva

Agreements in 2002, his denial of the writ of habeas corpus for detainees in the war on terror, his order that the National Security Agency monitor messages to or from domestic parties in the United States without a warrant, and his use of signing statements.

The Framers of the Constitution were influenced by their English constitutional heritage with respect to individual rights and drew heavily upon British precedents. But with respect to governmental structure, they rejected British precedent and created a separation of powers system based on a written Constitution. The principles upon which they designed the Constitution included explicit limits on the powers of government and a separation of powers structure intended to prevent the accumulation of power in any one branch of government.

The system set up by the Framers has worked reasonably well for more than two centuries of political experience (with the exception of the Civil War). In the 19th century, the Congress tended to dominate policy making, except in cases of war. But in the 20th century the presidency accumulated sufficient power to play a dominating role in both domestic and foreign policy. One of the important constitutional confrontations between the presidency and Congress over a range of issues occurred during the “imperial” presidencies of Lyndon Johnson and Richard Nixon. In reaction to the aggrandizement of power in the presidency, Congress asserted its own constitutional authority by enacting a number of laws intended to constrain presidential power.

It is this congressional reassertion of constitutional authority in the 1970s that Vice President Cheney and President Bush intended to reverse when they came to power in 2001. The administration, particularly Vice President Cheney, who had served as chief of staff to President Ford, felt that Congress overreacted to Vietnam and Watergate and hobbled presidential power in unconstitutional ways. As he said,

The feeling I had [during the Ford years], and I think it's been borne out by history, that in the aftermath, especially of Vietnam and Watergate, that the balance shifted, if you will, that, in fact, the presidency was weakened, that there were congressional efforts to rein in and to place limits on presidential authority. (Walsh 2006)

A White House aide later articulated an attitude seemingly shared by many at the top levels of the Bush administration:

The powers of the presidency have been eroded and usurped to the breaking point. We are engaged in a new kind of war that cannot be fought by old methods. It can only be directed by a strong executive who alone is not subject to the conflicting pressures that legislators or judges face. The public understands and supports that unpleasant reality, whatever the media and intellectuals say. (Hoagland 2006)¹

Those “conflicting pressures,” of course, are *the whole point* of the separation of powers system. The atrocities of 9/11 gave President Bush the opportunity to achieve much of the expansion of executive power that he had sought

since he became president. This article will take up four cases of extraordinary claims that President George W. Bush has made to executive authority under the Constitution: suspending the Geneva Conventions, denying habeas corpus appeals, NSA surveillance, and signing statements.

I. SUSPENDING THE GENEVA CONVENTIONS AND TORTURE

George W. Bush has been the only U.S. president to defend publicly the right of United States personnel to torture detainees. Probably the president did not intend for U.S. personnel to commit the egregious acts of torture that resulted in the death of many detainees. But he did argue that U.S. personnel needed to use aggressive techniques when interrogating prisoners captured in the war on terror. Despite declarations that “we do not torture,” the aggressive interrogation procedures that were used by U.S. personnel (military, CIA, and contractors) in Guantanamo, Afghanistan, and Abu Ghraib are considered by most of the world to be torture. The Bush administration, in determining the legal basis of interrogation policy, used a narrow and technical definition of “torture” set forth in an Office of Legal Counsel memorandum of August 2002 (since rescinded). President Bush vigorously argued that it was essential to the war on terror to continue to pursue “the program” of aggressive interrogation when he argued against the Detainee Treatment Act of 2005 and in favor of the Military Commissions Act of 2006.

Although other presidents had decided to withdraw from treaties, no other president decided that the Geneva Conventions did not apply to U.S. treatment of captives in wartime. Despite presidential leeway in interpreting treaties, the Supreme Court in the *Hamdan* decision held that the provisions of the Geneva Convention Common Article 3 invalidated the military commissions that President Bush had set up to try suspected terrorists held at Guantanamo. This decision prompted the Bush Administration to convince Congress to pass the Military Commissions Act of 2006.

Despite the occurrence of torture in many U.S. wars, President Bush’s *policy making* with regard to enhanced interrogation practices (or torture, depending on the definition) is unprecedented in United States history. In contrast to a policy that encourages or condones torture, ad hoc torture that is against the law can be punished, and the principle that torture is forbidden can be upheld. But a policy that encourages and provides governmental sanction for coercive interrogation can easily be interpreted to justify torture, as was evident at Guantanamo and Abu Ghraib.

The Decision to Suspend the Geneva Conventions

The question of whether President Bush should declare that the Geneva Conventions did not apply to al Qaeda or the Taliban was the subject of a series of memoranda in early 2002. The memos culminated in a recommendation from Counsel to the President, Alberto Gonzales, that the president should

suspend the Geneva Conventions for members of al Qaeda. The January 25, 2002 memo recommended that the Geneva Convention III on Treatment of Prisoners of War (GPW) should not apply to al Qaeda and Taliban prisoners. He reasoned that the war on terror was “a new kind of war” and that the “new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners. . . .”² Gonzales argued that exempting captured al Qaeda or Taliban prisoners from treatment according to the Geneva Convention protections would preclude the prosecution of U.S. soldiers under the War Crimes Act (1997).³

Secretary of State Colin Powell objected to the reasoning of the Justice Department and the President’s Counsel, Alberto Gonzales. In a memo of January 2002, he argued that the drawbacks of deciding not to apply the Geneva Conventions outweighed the advantages because “It will reverse over a century of policy . . . and undermine the protections of the law of war for our troops, both in this specific conflict and in general; It has a high cost in terms of negative international reaction . . . ; [and] It will undermine public support among critical allies. . . .”⁴ Powell also noted that applying the Convention “maintains POW status for U.S. forces . . . and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention”(2002).

Despite Powell’s memo, and in accord with the Attorney General’s and his counsel’s recommendations, President Bush signed a memorandum on February 7, 2002 that stated: “Pursuant to my authority as Commander in Chief . . . I . . . determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva” (White House, 2002). This determination denied suspected members of al Qaeda prisoner of war status and allowed the use of aggressive techniques of interrogation used by the CIA and military intelligence at Guantanamo that were later, in the fall of 2003, transferred to the prison at Abu Ghraib.

The changes in policy regarding the status of prisoners at Guantanamo upset top level military lawyers in the Judge Advocate General Corps, including lawyers in the Chairman of the Joint Chiefs of staff’s office. In 2003 a group of JAG officers went to visit the New York City Bar Association’s Committee on International Human Rights. They were concerned about “a real risk of disaster,” a concern that later proved to be prescient (Barry, Hirsh and Isiskoff 2004; Hersch 2004).⁵

OLC Memoranda on Torture and Presidential Power

Shortly after 9/11 the Office of Legal Counsel of the Justice Department began work on legal aspects of the treatment of prisoners captured in the war on terror. Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel, signed a memorandum written in part by John Yoo (2006, 171). The memo dealt with how U.S. personnel could avoid punishment under Title 18 of the U.S. Code (criminal law). This law, The War Crimes Act, implemented

the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for the United States (Klaidman, 2004).

The Geneva Conventions require that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”⁶ The Convention Against Torture, as ratified by the United States, emphasizes that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Bravin 2004).⁷ The U.S. Torture Victims Protection Act defines torture as an: “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control” (18 U.S.C. Sec. 2340).

Part I of the Bybee memo interprets the above passage and construes the definition of torture narrowly; in doing so, it elevates the threshold of “severe pain” necessary to amount to torture: “We conclude that for an act to constitute torture, it must inflict pain that is . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (Bybee 1, 6). This narrow definition would allow a wide range of brutal actions that do not meet the exacting requirements specified in the memo. The memo specifically excludes from torture “cruel, inhuman, or degrading treatment or punishment,” some examples of which are specified, such as wall standing, hooding, noise, sleep deprivation and deprivation of food and drink. But the memo did specify that some practices would be torture, such as severe beatings with clubs, threats of imminent death, threats of removing extremities, burning, electric shocks to genitalia, rape or sexual assault (Bybee 15, 24, 28).⁸

In Section V, the memo argued that the president’s commander-in-chief authority can overcome any law. “[T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces” (Bybee 33). Thus “Any effort to apply Section 2340A [of Title 18 U.S.C.] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional” (Bybee 31).

The administration used the commander-in-chief clause to argue that a presidential policy takes precedence over public law. Thus, the administration argued, the president is not bound by the law, despite the Article II, Section 3 provision of the Constitution that the President “shall take care that the Laws be faithfully executed.” The implication was also that the Commander-in-Chief clause trumps the Article I, Section 8 provision that Congress has the authority to “make Rules concerning Captures on Land and Water.”⁹

These memoranda, along with other policy directives by Secretary of Defense Rumsfeld and others, set the conditions for torture and abuse that occurred at Guantanamo, Abu Ghraib, and Bagram Air Force Base in Afghanistan. A number of official inquiries as well as external reports, documented incidents of gross abuse and torture, some resulting in the deaths of detainees (Pfiffner 2005).

The McCain Amendment

Senator John McCain (R-AZ) endured five years as a prisoner of war in Vietnam and suffered severe torture. Thus his publicly expressed outrage at reports of torture perpetrated by U.S. soldiers and civilians at Guantanamo, Abu Ghraib, and in Afghanistan carried a large measure of legitimacy. McCain introduced an amendment to the Department of Defense Appropriations Act for 2006 to ban torture by U.S. personnel, regardless of geographic location. Section 1003 of the Detainee Treatment Act of 2005 provides that “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”¹⁰

Vice President Cheney led administration efforts in Congress to defeat the bill (White 2005). Cheney first tried to get the bill dropped entirely, and when that failed, to exempt the CIA from its provisions. President Bush threatened to veto the bill if it was passed. Their efforts, however, were unavailing, and the measure was passed with veto-proof majorities in both Houses, 90 to 9 in the Senate, and 308 to 122 in the House. In a compromise, McCain refused to change his wording, but he did agree to add provisions that would allow civilian U.S. personnel to use the same type of legal defense that is accorded to uniformed military personnel.¹¹

However, when President Bush signed the bill, he issued a signing statement that declared: “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power” (The White House 2005). This statement signaled that President Bush did not feel bound by the law that he had just signed.

Thus President Bush, through his Office of Legal Council, claimed that he was not bound by the Geneva Conventions, that the commander in chief authority invalidated any laws about prisoners, and that he was not bound by the Detainee Treatment Act. These claims attempted to place President Bush outside the checks and balances of the separation of power system and the rule of law.

II. MILITARY COMMISSIONS AND HABEAS CORPUS

The Supreme Court delivered several setbacks to President Bush’s claims to executive power. In *Hamdi vs. Rumsfeld* (542 U.S. 507, 2004) the Court ruled that U.S. citizens had the right to challenge their imprisonment at Guantanamo in court. In *Rasul vs. Bush* (542 U.S. 466, 2004), the Court held that non-citizens could challenge their detentions through habeas corpus petitions. And in *Hamdan vs. Rumsfeld* (126 S.Ct. 2749, 2006) the Court ruled that the military commissions set up by President Bush were unlawful because they were not based on U.S. law and that they violated Common Article 3 of the Geneva Conventions.

The Supreme Court's Hamdan Decision

Despite the Bush administration's arguments that U.S. courts did not have jurisdiction over Guantanamo detainees, that the president's commander in chief authority was sufficient to detain people indefinitely, and that detainees were receiving sufficient due process rights, the Supreme Court ruled against the administration in the above mentioned cases. In *Hamdi*, the court declared that "the most elemental of liberty interests" is "the interest in being free from physical detention by one's own government ["without due process of law"]. . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. . . ." Thus "we reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law. . . ."

This requirement of due process does not apply to "initial captures on the battle field," but "is due only when the determination is made to *continue* to hold those who have been seized." In making these judgments, the Court asserted that, despite administration arguments to the contrary, it had jurisdiction over executive branch imprisonments and that it was willing to enforce constitutional rights even during a time of war. In *Rasul vs. Bush*, the Court (deciding on the basis of law, not on constitutional grounds) held that non-citizens also had the right to challenge their imprisonment through a habeas corpus petition.

On the issue of whether the United States is permitted to try non-citizen enemy combatants by the military commissions that the president had established, the Supreme Court in *Hamdan* ruled in the negative, overturning a Court of Appeals decision.¹² Justice Stevens, writing for the Court, concluded that the military commissions and procedures established by President Bush were not authorized by the Constitution or any U.S. law, and thus the President had to comply with existing U.S. laws. He explained that the "structures and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949." (*Hamdan* 4). The Court finally concluded: "Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment" (*Hamdan* 7).

Perhaps the most important principle established in these Supreme court cases was Justice Sandra Day O'Connor's statement in the majority opinion in *Hamdi*: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."¹³

The Military Commissions Act of 2006

In order to overcome the roadblock that the Supreme Court decisions threw in the way of administration policy, President Bush sought legislation that would authorize the creation of military commissions and spell out limits on the rights of detainees. President Bush argued that the types of harsh

interrogation methods that he termed “the program” were essential to the war on terror. The administration maintained that the proposed law would allow CIA interrogators more leeway than Common Article 3 of the Geneva Conventions allowed.

President Bush argued strongly for passage of the administration’s proposal, saying that it would provide “intelligence professionals with the tools they need” (Smith 2006a; Smith 2006b; Babington & Weisman 2006). He maintained that “The professionals will not step up unless there’s clarity in the law. . . . I strongly recommend that this program go forward in order for us to be able to protect America” (Bush 2006).¹⁴ The allowed interrogation techniques were not specified in the law, but were said to include prolonged sleep deprivation, stress positions, isolation, inducing hypothermia, excessive heat, and earsplitting noises. Members of Congress, including John McCain, also said that waterboarding¹⁵ was not allowed by the Military Commissions Act, but their understanding was called into question when Vice President Cheney seemed to refute it (Vice President’s Office, 2006; Eggen, 2006b & Lewis, 2006).¹⁶ On September 13, 2006 former Secretary of State Colin Powell wrote a public letter to Senator McCain urging him to oppose the redefining of treatment allowed under Common Article 3, because “the world is beginning to doubt the moral basis of our fight against terrorism,” and because “it would put our own troops at risk” (Reid, 2006).

After several weeks of contentious debate between the two political parties, S3930 was passed by both houses of Congress. President Bush signed the Military Commissions Act of 2006 (PL 109-366) into law on October 17, 2006. The law gave the Bush administration most of what it wanted in dealing with detainees in ways that were prohibited by the *Hamdan* ruling. Most directly, the law authorized the president to establish military commissions to try alien detainees believed to be terrorists or unlawful enemy combatants. The vehement arguments made by President Bush that the MCA was needed in order for the administration to continue to use “the program” of “robust” interrogation techniques constitutes an admission that the administration had used them and saw them as essential to its approach to interrogation.

Importantly, the law denied alien enemy combatants access to the courts for writs of habeas corpus concerning “any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States” (Sec. 7 (2)). Appeals that were allowed were limited to issues concerning the constitutionality of the law itself and the administration’s compliance with it, but not the evidentiary basis for the detainee’s imprisonment or his treatment while in custody.

The law forbids the use of testimony obtained through “torture,” and it specifically outlaws the more extreme forms of torture. The interrogation methods that can be used against the accused also exclude those methods that “amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005” (Sec. 948r). Under

the administration's interpretation, the law prohibits only techniques that "shock the conscience," rather than the stricter prohibition in Common Article 3 which specifically forbids "outrages upon personal dignity, in particular humiliating and degrading treatment . . ." (Elsea, 2004, p. 5; Smith, 2006a). The Military Commissions Act allocated significant new powers to the president. It allows the president or secretary of defense to decide unilaterally who is an enemy combatant; it allows the executive to prosecute a person using coerced testimony; and it precludes any oversight of the actions of the executive by the judiciary (Shane & Liptak 2006).¹⁷

Critics complained that this language did not amount to acceptance of Common Article 3 of the Geneva conventions and would allow very harsh treatment that could amount to torture. Techniques such as stress positions, sleep deprivation, sensory deprivation, isolation, or earsplitting noises could amount to torture, said critics, depending on the intensity and duration of their use. Statements obtained with these methods could be used against a detainee if the presiding officer decides that the "interests of justice would best be served" and that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" (Sec. 948r).

In addition, critics of the administration argued that the new law would allow U.S. forces to capture anyone declared an "enemy combatant" anywhere in the world, including those thought to have purposefully supported hostilities against U.S. co-belligerents, and hold them indefinitely. These suspects could be held without charges being filed against them and subjected to harsh interrogation techniques with no recourse to the courts for writs of habeas corpus. Critics also questioned whether the law could constitutionally deny the writ of habeas corpus to detainees, as the law purported to do (Shane & Liptak 2006; Zernike 2006; Grieve 2006; Fletcher 2006).

At the symbolic level, the Military Commissions Act sent the message to the world that the United States would continue to use harsh interrogation techniques (including waterboarding according to Vice President Cheney's statements) that most countries considered to be torture and in violation of Common Article 3 of the Geneva Conventions. At the legal level, it purported to deny habeas corpus for most detainees and allowed harsh interrogation methods to be used. At the constitutional level it represents a congressional ratification of executive authority to set up unilaterally military commissions, conduct trials, and sentence detainees with limited due process rights and no judicial or congressional oversight.

With the MCA, President Bush was able to accomplish through law what he had previously asserted to be his own constitutional authority. Ratification by Congress of the president's authority to deny habeas corpus appeals and due process rights to detainees, however, does not necessarily make them constitutional. But it does make it more difficult for the Supreme Court to constrain the president absent a change in the law by Congress. In seeking congressional sanction for his actions, President Bush did not abandon his claim that he, as president, had the constitutional authority to undertake them unilaterally.

III. WARRANTLESS ELECTRONIC SURVEILLANCE BY THE NATIONAL SECURITY AGENCY

In December 2005 the *New York Times* revealed that the Bush administration had been secretly monitoring telephone calls and e-mails between suspected foreign terrorists and people within the domestic United States. The legal right of the executive branch to conduct electronic surveillance on foreign intelligence targets is not in dispute, but the right of the government to secretly eavesdrop or wiretap suspects within the United States without a warrant is limited by the Fourth Amendment and the law.

The Foreign Intelligence Surveillance Act

During the 1970s it was revealed that the Nixon administration conducted a range of warrantless wiretaps in order to monitor their political adversaries (Senate Report 1978; Senate Report 1976; Schwarz & Huq 2007, 31; Bazan & Elsea 2005).¹⁸ Congress responded to these abuses by amending Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which controlled electronic surveillance by the government. The Act set procedures for seeking warrants for electronic surveillance and prohibited non-warranted surveillance. Title III of the Act provided an exception for certain national security surveillance undertaken under the “constitutional power of the President to take such measures as he deems necessary to protect the National against actual or potential attack . . . , [and] to obtain foreign intelligence information deemed essential to the security of the United States . . .” (Bazan & Elsea 2005, 17).¹⁹

That section of Title III was repealed by the Foreign Intelligence Surveillance Act of 1978 (FISA) (Cole et al. 2006).²⁰ It was amended to allow for the surveillance for foreign intelligence acquisition only as long as it was carried out pursuant to the Foreign Intelligence Surveillance Act of 1978. The amended Act specified that: “the Foreign Intelligence Surveillance Act of 1978 shall be the *exclusive means* by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted” (emphasis added) (Bazan & Elsea 2005).²¹

The Foreign Intelligence Surveillance Act (FISA) provides for a special court for the consideration of warrants for electronic surveillance, if probable cause is shown that the suspect is likely to be an agent of a foreign power. In requiring a warrant from the special FISA court, the law provides for three exceptions: 1) if the Attorney General determines that the communication is among foreign powers or their agents and “there is no substantial likelihood that the surveillance will acquire the contents of any communication of which a United States person is a party”; 2) if the Attorney General determines that there is insufficient time to obtain a warrant, but in such a case a FISA judge shall be notified within 72 hours (changed from 24 hours on December 28, 2001); and 3) finally, surveillance can be conducted without a warrant for fifteen days after Congress declares war (Bazan & Elsea 2005, pp. 25–26).

In confirming the *New York Times* report of the secret surveillance program, President Bush said that warrantless spying on domestic persons suspected of being in contact with terrorists was “a vital tool in our war against the terrorists,” and that revealing the program damaged U.S. security (Sanger 2005). “It was a shameful act for someone to disclose this very important program in a time of war. The fact that we’re discussing this program is helping the enemy” (Baker & Babington 2005).

It is not as if President Bush did not have the means to undertake the NSA spying within the law. He could have sought warrants by the special FISA courts set up for that very purpose. If speed was of importance, NSA could have carried out the surveillance and come back to the FISA court within 72 hours for retrospective authorization, as provided for by the law. Or if the law, as written, was too narrow to allow the kind of surveillance deemed necessary (e.g., data mining or call tagging), the President could have asked Congress to change the law (which had been amended several times since 9/11). But President Bush did none of these things; instead, he secretly ordered NSA to conduct the surveillance, and when his actions were disclosed, he asserted that he had the constitutional authority to ignore the law.

President Bush’s Arguments

The administration argued that getting a FISA warrant was too cumbersome and slow and thus it had to set up a secret program for the National Security Agency to conduct the warrantless surveillance in secret. The record of the FISA court, however, does not seem to indicate that the administration had trouble obtaining warrants. From the time that the court was created in 1978 to the end of 2005, it issued 18,748 warrants and refused only five (Baker & Babington 2005). This is about as close to a rubber stamp as one could wish for. As for the problem of speed, if the need was immediate, NSA could act immediately and come back to the court for authorization within 72 hours.

The administration also argued that it had consulted with Congress about the program, since it had informed the leadership and the chair and ranking members of the Senate and House intelligence committees. President Bush said, “Not only has it been reviewed by Justice Department officials, it’s been reviewed by members of the United States Congress” (Lichtblau, 2006). This argument was challenged, however, by Senator Jay Rockefeller, who had been briefed on July 17, 2003. The members of Congress were sworn to secrecy and told that they could not inform their colleagues or staffers about the program. After the briefing Rockefeller expressed his concern by hand-writing a letter to Vice President Cheney and copying the note and putting a sealed copy in his safe as evidence that he had expressed his concern. He had no alternative route to raise concerns about what he saw as potentially illegal actions by the administration. He wrote to the Vice President, “Clearly, the activities we discussed raise profound oversight issues” (Babington & Linzer 2005).

The administration also argued that the congressional Authorization to Use Military Force (AUMF) passed in a joint resolution after the September 11, 2001 attacks gave the president power by declaring that the president could:

use all necessary and appropriate force against those nations, organization, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or person. (Brimmett 2006)²²

The act, however, made no mention of foreign or domestic surveillance in its wording. The argument of the administration that the AUMF overcomes the FISA law would entail the implication that Congress intended to repeal the section of the law that declared FISA to be “the exclusive means by which electronic surveillance . . . may be conducted.”

When Congress was considering the authorization for the president to use force, the administration tried to insert in the language of the resolution a provision that would have allowed the “necessary and appropriate force” could be applied “in the United States” as well as against the “nations, organizations, or persons” who were involved in the 9/11 attacks. This language was rejected by the Senate, undermining the argument that the AUMF intended to repeal FISA (Daschle 2005). In addition, since Congress explicitly provided for warrantless wiretaps for 15 days subsequent to a declaration of war, how could a resolution on the use of force, which carries less legal or constitutional weight than a declaration of war, authorize wiretaps with no limitation?²³

Attorney General Gonzales, in explaining why the administration did not seek to amend FISA to allow for the warrantless wiretaps, replied that he was advised that such an amendment was unlikely to pass Congress (Eggen 2006a). But it is contradictory to argue that Congress likely would not grant the needed authority for warrantless wiretaps if it were asked and that at the same time, Congress had approved presidential authority for warrantless wiretaps in passing the AUMF (Cole et al. 2006). It was also disclosed that Justice Department lawyers drafted legislative changes to the USA Patriot Act that would have provided a legal defense for government officials who wiretapped with “lawful authorization” from the president. There would be no need for such legislation if the president clearly had inherent authority to authorize such wiretaps.²⁴

In addition to Senator Rockefeller’s concerns, members of the Bush administration Justice Department also had serious reservations. When the White House sought approval of continued use of the program in 2004, Acting Attorney General James B. Comey (Ashcroft’s deputy), refused to grant his approval. As a result, Andrew Card, the chief of staff, and White House Counsel, Alberto Gonzales, made a special trip to the hospital to try to get Attorney General John Ashcroft (who was in the hospital recovering from major surgery) to approve the program. With a dramatic statement from his bed, Ashcroft, with Comey present, refused to overrule his deputy (Lichtblau & Risen 2006;

Lichtblau 2006; Klaidman, Taylor, & Thomas 2006). Comey was then called to the White House and informed that the program would continue. Only the threat of resignations by Ashcroft, Comey, and several other high-level Justice Department officials convinced President Bush to heed the concerns of the lawyers. Only after President Bush convinced them that their concerns had been met, did they agree to the continuation of the program. What happened at the White House meeting has not been disclosed.

The question here is not whether there is a serious threat from terrorism or whether the government ought to be able to wiretap U.S. citizens without a warrant. It may or may not be good policy to allow the government to conduct such surveillance, but the constitutional process for making such decisions entails the legislative process and judicial interpretation of the law. President Bush claimed that, despite the laws enacted by Congress and duly signed by the president, he had inherent authority to ignore the law and set up a secret surveillance program that could act without warrants. The question is one of constitutional presidential authority versus the constitutional rights and duties of the other two branches. The Constitution does not give the president the authority to ignore the law. The wisdom of surveillance policy is a separate issue.

David Addington, Vice President Cheney's chief of staff and counsel, expressed his attitude toward the FISA court when he said: "We're one bomb away from getting rid of that obnoxious court" (Goldsmith 2007, 181). Jeffrey Goldsmith, Director of the Office of Legal Counsel, who was involved with policy making regarding the Terrorist Surveillance Program, said: "After 9/11 they [Cheney and Addington] and other top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations" (Goldsmith 2007, 181). Goldsmith pointed out that even NSA's lawyers were not allowed to examine the legal documents that justified the Terrorist Surveillance Program (Goldsmith 2007, 182).

IV. SIGNING STATEMENTS

Article I, Section 1 of the Constitution begins: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article II of the Constitution provides that: "The executive Power shall be vested in a President of the United States of America," and that "the President shall be Commander in Chief of the Army and Navy of the United States." Despite the Article II provision that the president "shall take Care that the Laws be faithfully executed," signing statements have been used to argue that Article II provisions trump Article I of the Constitution.

The idea of presidential signing statements begins with the reasonable presumption that each coordinate branch of government should have a role in interpreting the Constitution and its own constitutional powers. As James Madison said in *Federalist* No. 49: "The several departments being perfectly

co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." Thus within the checks and balances of the Constitution no single branch has the final say as to what the Constitution says or what public policy shall be. Each branch has a role in interpreting the Constitution, but each is subject to checks and balances from the other two branches.

Presidents since James Monroe have occasionally issued statements upon the signing of bills into law, though it was unusual for the first 150 years of the Republic. Most of these signing statements were rhetorical and meant to show presidential support for the legislation or occasionally to record publicly presidential reservations about the law. Rhetorical signing statements began to increase with the Truman administration. But the more important use of signing statements has been to register questions about the constitutionality of the law in question. The use of signing statements for this purpose began to be taken seriously during the Ford and Carter presidencies, but took a significant jump during the Reagan Presidency, during which they were used in a strategic manner to signify presidential disapproval of parts of a law that he was signing (Kelley, 2002).

The Reagan administration took a step toward changing the status of signing statements in 1986 when it arranged with West Publishing Company to publish signing statements in the "Legislative History" section of *The United States Congressional Code and Administrative News* (USCCAN), which provides information about the background for the development of a law that might be relevant to its future interpretation by courts. Attorney General Edwin Meese explained that the purpose of the administration's action was so that the president's thinking when signing a bill into law "will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means" (Garber & Wimmer 1987).

Such a purpose seems reasonable, because it merely calls to the attention of the courts the president's perspective on the law. This benign interpretation of signing statements, however, was undercut by Meese's later statement of the intent of signing statements in 2001, in which he said that in addition to expressing the president's view of a law, that it would indicate "those provisions of the law that might not be enforced" (Kelley 2002). There is a big difference, however, between expressing an opinion on the meaning of a law and refusing to enforce the provisions of a law of which a president disapproves. Presidents Carter, Reagan, Bush, and Clinton occasionally used signing statements to indicate that they had reservations about the laws they were signing and might not enforce.

President George W. Bush, however, used signing statements to an unprecedented extent. He issued more than 1,000 constitutional challenges to provisions in 150 laws in his first six years in office (Kelley 2007, ABA 2006). He also used signing statements to assert the unilateral and unreviewable right of the executive to choose which provisions of laws to enforce and which to ignore. For instance, he has used them to indicate that he

does not feel bound by all of the provisions of laws regarding: reporting to Congress pursuant to the PATRIOT Act; the torture of prisoners; whistleblower protections for the Department of Energy; the number of U.S. troops in Columbia; the use of illegally gathered intelligence; and the publication of educational data gathered by the Department of Education (Savage 2006; 2007, 228–249).

One problem with signing statements of this sort is that they can accomplish what the Framers decided not to give the president: an absolute veto. The constitutional process calls for bills to be passed by Congress and presented to the president for his signature or veto. But a signing statement, in effect, allows the president to sign the bill, and later to decide if he does not want to comply with part of the law. It also allows the president to achieve, in effect, an item veto, which the Supreme Court has declared unconstitutional. In the passage of legislation members of Congress often vote for a bill because of assurances that certain provisions have meaning. But if the executive can unilaterally decide not to enforce whatever portion of laws it believes infringe on its constitutional power, the votes of a majority of the members of Congress are effectively nullified.

The belief that he could selectively enforce the law pursuant to his signing statements may be part of the reason that President Bush did not issue any vetoes for the first five and a half years of his administration, a record unmatched since Thomas Jefferson. An example (discussed previously) of the potentially unchecked nature of signing statements occurred when President Bush strongly opposed and threatened to veto the Detainee Treatment Act, sponsored by Senator John McCain (R-AZ), forbidding torture. It was passed by both Houses of Congress by veto-proof majorities. President Bush signed the law in a ceremony at the White House with John McCain, symbolizing the administration's intent not to use torture in order to obtain information from prisoners.

In his accompanying signing statement, however, President Bush indicated that he did not feel bound by the law and that he would enforce the law "in a manner consistent with the constitutional authority of the President . . ." (cited previously). Thus the president reserved for himself the right to ignore the law when he deemed it to conflict with his commander in chief power, but he avoided the constitutional process of having to subject his veto to a possible override by Congress. Since the administration had previously asserted that Congress could not limit the way in which the executive treated prisoners, the implication was that it would not consider itself bound by the provisions of the law. The administration also seemed to claim in the signing statement that it could avoid judicial review.

The implications of these sweeping claims to presidential authority are profound and undermine the very meaning of the rule of law. Despite the Constitution's granting lawmaking power to the Congress, the Bush administration maintained that executive authority and the commander in chief clause can overcome virtually any law that constrains the executive. President Bush was thus claiming unilateral control of the laws. If the executive claims that it is not subject to the law as it is written but can pick and choose which provisions to

enforce, it is essentially claiming the unitary power to say what the law is. The “take care” clause of Article II can thus be effectively nullified.

Even though there may occur some limited circumstances in which the president is not bound by a law, expanding that limited, legitimate practice to more than 1,000 threats to not execute the law constitutes an arrogation of power by the president.²⁵ The Constitution does not give the president the option to decide *not* to faithfully execute the law. If there is a dispute about the interpretation of a law, the interaction of the three branches in the constitutional process is the appropriate way to settle the issue. The politics of passage, the choice to veto or not, and the right to challenge laws in court all are legitimate ways to deal with differences in interpretation. But the assertion by the executive that it alone has the authority to interpret the law and that it will enforce the law at its own discretion threatens the constitutional balance set up by the Constitution.

CONCLUSION: THINKING CONSTITUTIONALLY

Even if one posits that President Bush has not and would not abuse his executive power, his claim to be able to ignore the law, if allowed to stand, would constitute a dangerous precedent that future presidents might use to abuse their power. Joel Aberbach points out that “In the end, this is not a partisan issue, for someday the Democrats will have unified control, and even that somewhat-less-disciplined party might countenance a government of the type Bush and Cheney have apparently structured” (2008). Madison argues in Federalist No. 10, “Enlightened statesmen will not always be at the helm.” Thinking constitutionally means looking ahead and realizing that future executives will likely claim the same authority as their predecessors. Claims to executive power ratchet up; they do not swing like a pendulum unless the other two branches protect their own constitutional authorities.

The rule of law is fundamental to a free society and to democracy, because neither can exist without it. As Thomas Paine argued in *Common Sense*, “in America THE LAW IS KING. For as in absolute governments the King is law . . . ” (emphasis in original). James Madison put it this way in Federalist 47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” In each of the following cases of claims to constitutional authority President Bush was asserting that he alone could exercise the authority of each of the three branches:

1. *Geneva Conventions and torture*: President Bush acted as
 - *lawmaker* in suspending the treaty, which according to Article VI of the Constitution is “the supreme Law of the Land,”
 - *executive* in carrying out the policy by interrogating prisoners with harsh interrogation practices, and he acted as
 - *judge* by keeping the proceedings secret and asserting that any appeal could only be to him and that the courts had no jurisdiction to hear appeals.

2. **Military tribunals:** President Bush acted as
 - *lawmaker* in creating the commissions himself, not in accord with enacted laws,
 - *executive* in detaining suspects in prisons, and he acted as
 - *judge* in conducting the trials, imposing sentences, and serving as the final appeal.
3. **Denying habeas corpus to detainees:** President Bush acted as
 - *lawmaker* in suspending habeas corpus, which authority the Constitution gives to Congress,
 - *executive* in imprisoning detainees and not allowing them to appeal for writs of habeas corpus and denying them the aid of counsel (until forced to by the Supreme Court), and he acted as
 - *judge* in asserting that executive branch determinations of detainee status were final and that appeals could only be within the executive branch.
4. **NSA warrantless wiretapping:** President Bush acted as:
 - *lawmaker* by determining that he could ignore the regularly enacted law and impose his own rules in order to conduct surveillance in the United States,
 - *executive* in ordering NSA to carry out his policies, and he acted as
 - *judge* by arguing that it was his inherent right as president to do it in secret and avoid obtaining warrants from the FISA court.
5. **Signing Statements:** President Bush was
 - *undermining the separation of powers and the rule of law itself* by claiming the authority to ignore those parts of the law that he claimed impinged on his own prerogatives and refusing to accept the legitimacy of either Congress or the Courts to limit his authority.

The president should have enough power to accomplish reasonable policy goals, but not enough to override the other two branches unilaterally, acting merely on the basis of his own judgment. In these cases of extraordinary claims to executive authority, President Bush was claiming that the checks and balances in the Constitution were not binding on him. The United States Constitution created a system in which the concentration of power in one branch could be countered by actions of the other two branches. Congress and the courts still may act to undo some of President Bush's extraordinary assertions of executive authority, but his claims have severely challenged the balance of constitutional authority. The principles of constitutionalism and the rule of law underpin the foundations of the United States polity. Insofar as President Bush, in cases such as these, refused to acknowledge the constitutional limits on his executive authority, he undermined both of these fundamental principles.

Afterword on President Obama and Executive Power

As Senator and presidential candidate Barak Obama criticized President Bush for his assertions of presidential power, arguing that he had stepped beyond his constitutional bounds. Yet when he became president, he did not formally

abandon all of the Bush precedents. The scope of his actions did not approach those of President Bush, but Obama did not explicitly give up much of the claimed executive power that President Bush asserted.

President Bush's claims to executive authority left the incoming Obama administration in a delicate situation. On the one hand, Obama wanted to distinguish his administration from President Bush's use of executive power. But on the other hand he was not completely free to begin with a blank slate, in several important ways.

Presidents and their lawyers are loathe to cede powers to the other branches of government. Thus once a prerogative is asserted, a new president, even if he would not have made the initial assertion of that power, will hesitate to renounce it. So even if Obama did not intend to use Bush's claims to executive power, he felt bound to protect the office and prerogatives of the presidency.

Secondly, President Bush left Obama with several *faits accomplis*. The US prison at Guantanamo Bay, Cuba still held more than 100 prisoners when Bush left office. In addition, a number of those who were left had been treated abusively during interrogations, thus making their prosecution legally dubious because evidence against them had been gathered through coercion. Since a significant number of the inmates were most probably guilty of terrorism or would seek revenge on the U.S. if released, Obama was stuck with the issue of indefinite detention without trial.

Finally, despite bipartisan support for closing Guantanamo in 2008, the partisan political atmosphere had become so polarized that it became very difficult for Obama to try suspected terrorists in court or even to release those who were admittedly not threats to the United States.

As a consequence of these factors, President Obama's record on executive power issues has been mixed, whether one believes president Bush was fully justified in his assertions of executive power or whether one believes that he illegitimately expanded executive prerogatives. The following points highlight President Obama's record on the use of executive power.

1. With respect to enhanced interrogation techniques President Obama promised "a clean break from business as usual" and on January 22, 2009, he issued an executive order setting Common Article 3 of the Geneva Conventions as a "minimum baseline" for treating detainees and directing the CIA to conduct interrogations consistent with Army Field Manual 2-22.3 (2006). In doing this, Obama was severely criticized by former Vice President Cheney for jeopardizing U.S. security.
2. Before Obama became president, there was bipartisan support for closing the Guantanamo Bay prison, which had become an international symbol of U.S. abuse of detainees. Despite an executive order directing that the prison be closed within a year of his inauguration, Congress passed several measures making it difficult or impossible for Obama to follow through on his intention. Congress also made it exceedingly difficult for Obama to transfer detainees out of Guantanamo, either into the continental United States for trial or to other countries. Thus Obama made genuine attempts

- to fulfill his campaign promise to close Guantanamo but was prevented from doing so by votes in Congress by members of both parties.
3. Common Article 3 of the Geneva Conventions requires that defendants be tried by regularly constituted courts, and Obama initially delegated the decision about how to prosecute detainees to Attorney General Eric Holder. But when Holder announced his decision to try suspected terrorists in Article III courts, the political heat was so intense that he stepped back and ordered a detailed review of the Guantanamo detainees and how they should be dealt with. In early 2011 Obama decided that some of them could be released, some could be tried in Article III Courts, some would be tried by military commission, and some would be detained indefinitely without trial.
 4. With respect to surveillance, the laws governing intercepting suspect communications were changed, allowing Obama to do legally what President Bush had asserted a unilateral right to do. Questions of civil rights and liberties may arise, but not unilateral executive assertions of presidential power.
 5. With respect to signing statements, early in his administration Obama stated that he would “issue signing statements to address constitutional concerns only when it is appropriate to do so. . . .” and that he would inform Congress about any concerns about the constitutionality of any pending law. During his first three years in office, Obama kept his promise, but he did occasionally use signing statements to challenge the constitutionality of parts of laws, and refused to comply with those parts of the law. Though he used signing statements on a much smaller scale than President Bush, he did not abandon the principle of using them to assert presidential prerogatives.
 6. Obama arguably continued the practice of the Bush administration with respect to the assertion of the state secrets privilege. He argued that civil cases concerning extraordinary rendition and torture would necessarily disclose state secrets and jeopardize national security. Courts have generally accepted these claims at face value and without challenge.
 7. Most problematic, with respect to executive prerogative, was Obama’s executive order declaring that some Guantanamo prisoners would be held indefinitely without trial.
 8. As scholar Louis Fisher documents later in this volume, in the spring of 2011 President Obama sent U.S. military forces to help topple Libyan dictator Muammar Gaddafi without obtaining Congressional approval (2012). The War Powers Act of 1973 requires that the president withdraw U.S. troops engaged in hostilities unless he obtains congressional approval. Obama argued that the Libyan operation did not constitute “hostilities” as contemplated in the War Powers Resolution and refused to withdraw U.S. forces.

Thus, even though President Obama was not as assertive of executive prerogatives as president Bush, he continued to protect presidential independence of

congressional and judicial constraints, just as the Framers of the Constitution would have expected.

ENDNOTES

1. Source: White House aide defending U.S. policies on Guantanamo Bay prisoners, secret renditions and warrantless eavesdropping in a conversation with Jim Hoagland.
2. Memorandum for the President (25 January 2002) From Alberto R. Gonzales, subject: Decision RE application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban." According to *Newsweek*, the memo was "actually" written by David Addington, Vice President Cheney's legal aide (Klaidman, 2004). Gonzales has been criticized in the press for saying that the "new paradigm" renders the Geneva limitations "quaint." But the context of his use of the word "quaint" is not as damning as excerpting the word makes it seem. The end of the sentence reads: "... renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e. advance of monthly pay), athletic uniforms, and scientific instruments." Whether this is a fair representation of the Geneva requirements is a separate issue.
3. The U.S. War Crimes Act (18 U.S.C. Par. 2441 (Sup. III 1997) (WCA). Section 2441 of the War Crimes Act defines "war crimes" as a "grave breach" of the Geneva Conventions, which includes "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health . . . or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."
4. Memorandum TO: Counsel to the President and Assistant to the President for National Security Affairs, FROM: Colin L. Powell (26 January 2002) SUBJECT: "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan." Many of the memoranda and oral directives included statements that detainees were to be treated "humanely" despite the more aggressive interrogation techniques to which they could be subjected. The problem was that if the detainees were in fact treated humanely, it would be more difficult to extract information from them. Thus these statements must have been considered to be *pro forma*, while the overall thrust of the directives was that detainees were to be subject to more aggressive interrogation techniques that were outside the Geneva Convention limits.
5. For a detailed analysis of the legal issues involved in the treatment of prisoners and the international and legal obligations of the United States regarding detainees, see: Robert K. Goldman and Brian D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," (Washington, D.C.: American Society of International Law Task Force Paper, 2002). See also: Jennifer K. Elsea, "Lawfulness of Interrogation Techniques under the Geneva Conventions," Washington: Congressional Research Service Report to Congress (RL32567), September 8, 2004; Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Issues," Congressional Research Service Report for Congress (RL32395), December 2, 2004; and L.C. Green, *The Contemporary Law of Armed Conflict* (NY: Manchester University Press, 1993). The skeptical attitude of many in the professional military was reflected in a 2007 op-ed piece by former Generals Charles C. Krulak (former Commandant of the Marine Corps) and Joseph P. Hoar (former chief of Central Command): "As has happened with every other nation that has tried to engage in a little bit of torture—only for the toughest cases, only when nothing else works—the abuse spread like wildfire, and every captured prisoner became the key to defusing a potential ticking time bomb. Our soldiers in Iraq confront real "ticking time bomb" situations every day, in the form of improvised explosive devices, and any degree of "flexibility" about torture at the top drops down the chain of command like a stone—the rare exception fast becoming the rule." *Washington Post* (May 17, 2007), p. A17.
6. Article 17, paragraph 4.
7. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. [General Assembly Resolution 39/46, Annex, 39 U. GAOR Sup. No. 51,

- U.N. Doc. A.39/51 (1984). The Convention Against Torture (CAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession. . . .”
8. According to the memo, for the law to apply, the torturer must have the “specific intent to inflict severe pain” and it must be his “precise objective.” (p. 3) “Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.” Thus one could inflict pain that amounted to torture, but not be guilty of torture if the main objective was, for instance, to extract information rather than to cause pain. This reasoning borders on sophistry. On December 30, 2004 the Bybee memo was superseded “in its entirety” by “Memorandum for James B. Comey, Deputy Attorney General from Acting Assistant Attorney General Daniel Levin Re: Legal Standards Applicable Under 18 U.S.C. par. 2340–2340A.” The memo did not address the commander in chief powers of the president because it was “unnecessary” (p. 2).
 9. Article VI of the Constitution also provides that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.”
 10. The Detainee Treatment Act defines cruel, inhuman, or degrading treatment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United State Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment done at New York, December 10, 1984.”
 11. That is, if the U.S. person undertakes interrogation practices that “were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”
 12. The commissions were established by Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” Available at: <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>
 13. In remarks after she had retired from the Supreme Court, Justice O'Connor said about the intimidation of federal judges, “we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings.” Her remarks were reported by Nina Totenberg of National Public Radio according to Raw Story (Totenberg 2006).
 14. The uniformed military, however, were not eager for the bill to pass. Major General Scott C. Black, the judge advocate general of the Army, said that “further redefinition” of the Geneva Conventions “is unnecessary and could be seen as a weakening of our treaty obligations, rather than a reinforcement of the standards of treatment” (Baker 2006).
 15. Waterboarding is a technique of interrogation in which a person is bound to a flat board and his head submerged in water with a soaked cloth over his mouth (or water poured over the cloth) until the person cannot breath sufficient air and is convinced he is drowning. A Japanese officer, Yukio Asano, was sentenced to 15 years at hard labor for waterboarding an American in World War II (Pincus, 2006; Shane & Liptak, 2006).
 16. Vice President Cheney was interviewed in the White House by a reporter who asked: “Would you agree that a dunk in water [of a suspected terrorist] is a no-brainer if it can save lives?” Cheney replied: “It’s a no-brainer for me . . . We don’t torture. . . . But the fact is, you can have a fairly robust interrogation program without torture, and we need to be able to do *that*. And thanks to the leadership of the President now, and the action of the congress, we have that authority, and we are able to continue to [sic] Program.” (emphasis added) Asked in another question about “dunking a terrorist in water,” Cheney replied: “I do agree. And I think the terrorist threat, for example, with respect to our ability to interrogate high value detainees like Khalid Sheikh Mohammed, *that’s* been a very important tool that we’ve had

to be able to secure the nation.” (emphasis added). The antecedent to the word “that” and “that’s” in the Vice President’s statements is clearly “dunking a terrorist in water,” indicating that the Bush administration does not consider waterboarding to be torture (Vice President’s Office 2006).

17. It does allow appeals concerning the constitutionality of the law itself and whether the administration has complied with it.
18. House Report No. 95–1283, pp. 15–21, as cited in Bazan & Elsea 2005, pp. 12–13.
19. 82 Stat. 214, 18 U.S. par 2511(3), as cited in Bazan & Elsea 2005 p. 17.
20. Public Law 95–511, 92 Stat. 1783. as cited in Cole, et. al. 2006.
21. 18 U.S.C. par. 2511(2)(f), Public Law 95–511, 92 State 1783, as quoted in Bazan and Elsea 2005 p. 15.
22. Authorization for Use of Military Force, Public Law 107–40, 115 Stat. 224 (2001), passed the House and Senate on September 14, 2001 and signed by the president on September 18, 2001.
23. The NSA surveillance revelations also raised the issue of whether President Bush was truthful in reassuring questioners about government surveillance and civil liberties. In remarks in Buffalo, New York on April 20, 2004, President Bush said: “Now, by the way, any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so. It’s important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution” (Bush 2004).
24. Justice Department spokespersons said that the drafts were not intended to affect the NSA spying and that the proposals were not presented to the Attorney General or the White House (Eggen 2006a).
25. For instance, if a law contains a one house legislative veto provision or a clearly unconstitutional infringement on the president’s appointment power.

REFERENCES

- 18 U.S.C. Sec. 2340. 1994. Available from: <http://uscode.house.gov/download/pls/18C113C.txt>.
- 18 U.S.C. Sec. 2340A. 1994. *U.S. Criminal Law that Implements the U.N. Convention Against Torture*. Available from: <http://uscode.house.gov/download/pls/18C113C.txt>.
- Aberbach, Joel. 2008. “Supplying the Defects of Better Motives?” in Campbell, et al. Washington: CQ Press, 130.
- American Bar Association. 2006. “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” July 2006. 14 Available from: http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.
- Babington, Charles; and Linzer, Dafna. 2005. “Senator Sounded Alarm in ’03,” *The Washington Post*, December 20, A10.
- Babington, Charles; and Weisman, Jonathan. 2006. “Senate Approves Detainee Bill Backed by Bush,” *The Washington Post*, September 29, 1.
- Baker, Peter. 2006. “GOP Infighting on Detainees Intensifies,” *The Washington Post*, September 16, A01.
- Baker, Peter; and Babington, Charles. 2005. “Bush Addresses Uproar Over Spying,” *The Washington Post*, December 20, A01.
- Barry, John; Hirsh, Michael; and Iskoff, Michael. 2004. “The Roots of Torture,” *Newsweek*, May 24, 28–34.
- Bazan, Elizabeth B.; and Elsea, Jennifer K. 2005. “Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information,” *Congressional Research Service*, January 5.
- Bravin, Jess. 2004. “Pentagon Report Set Framework for Use of Torture,” *Wall Street Journal*, June 7.

- Brimmett, Richard F. 2006. "Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History", *Congressional Research Service* (Order Code RS22357), January 4.
- Bush, George. 2004. "President Bush: Information Sharing, Patriot Act Vital to Homeland Security," *The White House*, April 20. Available from: www.whitehouse.gov/news/releases/2004/04/print/20040420-2.html.
- Bush, George. 2006 Press Conference of the President. September 15. Available at: <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>
- Bybee, Jay S. 2002. *Memorandum for Alberto R. Gonzales, Counsel to the President re: Standards of Conduct for Interrogation under 18 U.S.C. Sec. 2340-2340A*, August 1, 1-33. Available from http://www.washingtonpost.com/wp-srv/politics/documents/chene/torture_memo_aug2002.pdf.
- Campbell, Colin; Rockman Bert A.; and Rudalevige, Andrew. 2008. *The George W. Bush Legacy*. Washington: CQ Press.
- Cole, David, et. al. 2006. "On NSA Spying: A Letter to Congress," *New York Review of Books*. February 9, 42.
- Daschle, Tom. 2005. "Power We Didn't Grant," *The Washington Post*, December 23, A21.
- Eggen, Dan. 2006a. "2003 Draft Legislation Covered Eavesdropping," *The Washington Post*, January 28, A02.
- Eggen, Dan. 2006b. "Cheney's Remarks Fuel Torture Debate," *The Washington Post*, October 27, A09.
- Elsea, Jennifer K. 2004. *Lawfulness of Interrogation Techniques under the Geneva Conventions*, 2. Washington, DC. Congressional Research Service Report to Congress (RL32567). September 8, 2004.
- Fisher, Louis. 2012. "President Obama's War in Libya." in Pfiffner, James P. and Davidson, Roger H., *Understanding the Presidency*. 7th ed. NH: Pearson.
- Fletcher, Michael A. 2006. "Bush Signs Terrorism Measure," *The Washington Post*, October 18, A4.
- Garber, Marc N; and Wimmer, Kurt A. 1987. "Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power," *Harvard Journal on Legislation* Vol. 24, p. 367.
- Gonzales, Alberto R. 2002. *Memorandum for the President*, January 25. Available from <http://www.msnbc.msn.com/id/4999148/site/news/>.
- Goldsmith, Jack. 2007. *The Terror Presidency*. New York: Norton.
- Grieve, Tim. 2006. "The president's power to imprison people forever," *Salon*, September 26. Available from: http://www.salon.com/politics/war_room/2006/09/26/tyrannical_power/index.html.
- Hamdan v. Rumsfeld*, Secretary of Defense, et. al. Slip Opinion. 2005. 4, 7. Available from: <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>.
- Hersh, Seymour M. 2004. "The Gray Zone," *New Yorker*, May 24, 42.
- Hoagland, Jim. 2006. "Two Leaders' Power Failures," *The Washington Post*, March 9, A19.
- Jefferson, Thomas. 1789. Letter to James Madison (March 15). Quoted in Schlesinger.
- Kelley, Christopher S. 2002. "'Faithfully Executing' and 'Taking Care': The Unitary Executive and the Presidential Signing Statement," Paper presented at the American Political Science Association annual convention, 2002.
- Kelley, Christopher S. 2007. webpage: <http://www.users.muohio.edu/kelleycs/>; accessed June 7, 2007.
- Klaidman, Daniel. 2004. "Homesick for Texas," *Newsweek*, July 12, 32.
- Klaidman, Daniel; Taylor, Stuart Jr.; and Thomas, Evan. 2006. "Palace Revolt," *Newsweek*, February 6, 39.
- Lewis, Neil A. 2006. "Furor Over Cheney Remark on Tactics for Terror Suspects," *The New York Times*, October 28, A8.
- Lichtblau, Eric. 2006. "Bush Defends Spy Program and Denies Misleading Public," *The New York Times*, January 2, 11.
- Lichtblau, Eric; and Risen, James. 2006. "Justice Deputy Resisted Parts of Spy Program," *The New York Times*, January 1, 1.

- Pfiffner, James P. 2005. "Torture and Public Policy," *Public Integrity*, Vol. 7, no. 4, 313–330.
- Pincus, Walter. 2006. "Waterboarding Historically Controversial," *The Washington Post*, October 5, A17.
- Powell, Colin L. 2002. *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, January 26, 2, 4. In Greenberg, Karen J. and Dratel, Joshua L. (Eds.), *The Torture Papers: the Road to Abu Ghraib* (124–125). New York, Cambridge University Press, 2005.
- Reid, Tim. 2006. "Republicans Defy Bush on Tougher CIA Interrogation," *Times Online*, September 15. Available from: http://www.timesonline.co.uk/tol/news/world/us_and_americas/article639839.ece.
- Sanger, David E. 2005. "In Address, Bush Says he Ordered Domestic Spying," *The New York Times*, December 18, A01.
- Savage, Charlie. 2006. "Bush Challenges Hundreds of Laws", *Boston Globe*, April 30. Available from: http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/.
- Savage, Charlie. 2007. *Takeover*. New York: Little Brown.
- Schwarz, Frederick A.O.; and Huq Aziz Z. 2007. *Unchecked and Unbalanced*. NY: The New Press.
- Senate Report No. 94–755. 1976. "Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities," *Intelligence Activities and the Rights of Americans*, Book II. (94th Congress, 2nd Session). April 24, 169.
- Senate Report No. 95–511, Title I, 92 Stat. 1796. 1978. codified as amended at 50 U.S. C. par. 1801 et seq. (October 25.) Available from: <http://uscode.house.gov/download/pls/50C36.txt>.
- Shane, Scott; and Liptak, Adam. 2006. "Shifting Power to a President," *The New York Times*. September 30, 1.
- Smith, Jeffrey R. 2006a. "Behind the Debate, CIA Techniques of Extreme Discomfort," *The Washington Post*, September 16, A3.
- Smith, Jeffrey R. 2006b. "Detainee Measure to have Fewer Restrictions," *The Washington Post*, September 26, 1.
- Totenberg, Nina. 2006. "Retired Supreme Court Justice Hits Attacks on Courts and Warns of Dictatorship," *The Raw Story*, March 10. Available from: http://rawstory.com/news/2006/Retired_Supreme_Court_Justice_hits_attacks_0310.html.
- Walsh, Kenneth T. 2006. "The Cheney Factor," *U.S. News & World Report*, January 23, 48.
- White, Josh. 2005. "President Relents, Backs Torture Ban," *The Washington Post*, December 16, 1.
- Vice President's Office. 2006. *Interview of the Vice President by Scott Hennen*, WDAY at Radio Day at the White House, October 24. White House Website. Available at: <http://www.whitehouse.gov/news/releases/2006/10/print/20061024-7.html>.
- White House. 2002. *Memorandum re: Humane Treatment of al Qaeda and Taliban Detainees*, signed by President Bush, February 7. Available from: <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=June&x=20040623203050cpataruk0.1224024&t=livefeeds/wf-latest.html>.
- White House. 2005. "President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006." December 30. Available from: <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.
- Yoo, John. 2006. *War by Other Means*. New York: Atlantic Monthly Press.
- Zernike, Kate. 2006. "Senate Approves Broad New Rules to Try Detainees," *The New York Times*, September 29, p.1.

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The Commander in Chief and the Courts

JULES LOBEL

The Bush administration claimed to have sweeping, inherent, and unchecked war powers to conduct its war against terror. In 2002, the Justice Department's Office of Legal Counsel argued that "Congress could no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield" (U.S. Department of Justice 2002b, 35). That position was later withdrawn as "unnecessary" but was never repudiated (U.S. Department of Justice 2004, 2), and the administration essentially reiterated it in the 2005 presidential signing statement stating that the executive branch would interpret the McCain Amendment's prohibition on cruel and inhumane interrogations of detainees "in a manner consistent with the constitutional authority of the President . . . as Commander in Chief and consistent with the constitutional limitations on judicial power" (Bush 2005). As a senior administration official later explained, the signing statement was intended to reserve the president's constitutional right to use harsh interrogation methods "in special situations involving national security" despite the congressional ban (Savage 2006).

Similarly, the Bush administration argued that the "President has the inherent authority to convene military commissions to try and punish captured enemy combatants even in the absence of statutory authority" (U.S. Department of Justice 2006b, 8). Although the administration did not claim that Congress had no power to regulate executive use of military commissions, it claimed that the president's inherent power "strongly counsel[ed]" against reading congressional statutes "to restrict the Commander in Chief's ability in wartime to hold enemy fighters accountable for violating the law of war" (ibid., 8–9).

The administration also claimed that the president's inherent constitutional authority as commander in chief and the nation's sole organ of foreign affairs allows him to authorize warrantless wiretapping, irrespective of the Foreign Intelligence Surveillance Act (FISA). If FISA is read to prohibit the National Security Agency's warrantless wiretapping program (which it surely does), the administration argues that it is unconstitutional (U.S. Department of Justice 2006a, 8). High-level administration advisors similarly claim that the president has the inherent authority to violate or suspend treaty provisions in wartime (U.S. Department of Justice 2002a, 16). The clearest and most sweeping statement of the president's authority came from the Department of Defense's Working Group Report on Detainee Interrogation in 2003 that

“in wartime it is for the President alone to decide what methods to use to best prevail against the enemy” (U.S. Department of Defense 2003, 24).

The administration also articulated a sweeping statutory theory to support its claim of inherent authority. Boiled down to its essentials, this theory reads a declaration of war or other congressional authorization to use force as providing legislative approval for virtually all of the inherent powers that the president claims he has in the absence of such authorization. Thus, the president has claimed that the 2001 Authorization of Use of Military Force Act (AUMF), which authorizes the president to use “all necessary and appropriate force” against the people, organizations, or nations involved in the September 11 attacks, provides congressional authorization to detain American citizens or other individuals indefinitely as enemy combatants, to engage in warrantless wiretapping, and to establish military commissions to try enemy combatants. In short, according to the administration, any authorization of force triggers and provides statutory authorization for the inherent powers of the president as commander in chief to take any actions he believes necessary to fight the enemy against whom force is authorized.

Finally, the administration claimed that just as Congress cannot interfere in determining what methods and tactics the president can use in fighting its war against terror, neither can the courts. In a series of cases, the Justice Department has claimed that the courts have no jurisdiction to even hear the claims of alien enemy combatants detained in Guantanamo or elsewhere, that they can only provide the most limited facial review of citizens deemed enemy combatants and detained in the United States, that they cannot review challenges to extraordinary renditions or the National Security Agency spying program, and that any review of the military commissions established by the president be extremely deferential.

This article will evaluate the administration’s claims in light of the constitutional design and theory adopted by its framers and the early leaders of the Republic. It will particularly focus on the role of the courts in matters of war and national security. The questions addressed are: (1) to what extent can Congress regulate the president’s prosecution of a duly authorized war? (2) what are the president’s inherent powers in conducting such warfare in the absence of congressional regulation? and (3) what is the role of the courts in deciding whether the president has overstepped his power in conducting such a war? . . .

THE JUDICIARY AND MILITARY NECESSITY IN THE CURRENT CONFLICT WITH AL QAEDA

An underlying motif of the Supreme Court’s recent decisions involving the administration’s war on terror has been the tension between judicial review and the executive’s articulation of claimed military necessity. As we have seen, the early Supreme Court generally did not defer to such claims. The modern judiciary’s record has been decidedly more mixed, most infamously in *Korematsu v. United States*, in which the Court deferred to the judgment of

the military authorities that the exclusion of Japanese Americans from the West Coast was a necessary war measure.¹ Moreover, in some cases, such as *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, the Court has employed broad language suggesting that executive foreign-policy decisions are political, not judicial decisions.² However, in the recent enemy combatant cases—*Hamdan v. Rumsfeld*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*—that Court has refused to defer to claims of broad, unreviewable executive decisions based on claimed military necessity and inherent executive power.

The Court's jurisprudence in the trilogy of recent enemy combatant cases rests critically on a distinction between military necessity on the actual battlefield in the midst of combat and claimed necessity to detain or try a detainee several years after their removal from the battlefield. In each of these cases, the Court either explicitly or implicitly found that a generalized claim of military necessity could not negate the Court's obligation to review the detainee's claims.

Most recently, in *Hamdan*, the Court struck down the administration's attempt to unilaterally establish military commissions to try alleged terrorists.³ Justice John Paul Stevens' opinion, much of which represented the Court majority and part of which was the opinion of the plurality of four justices, rested heavily on the Court's rejection of the argument that any military or practical necessity required these commissions.

Justice Stevens and the plurality framed the basic question in the case as "whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here."⁴ For the plurality, military commissions to try enemies who violate the laws of war—the type the Bush administration sought to implement—were premised on the "need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield."⁵ The administration, however, had failed "to satisfy the most basic precondition" for its establishment of military commissions—"military necessity."⁶ Justice Stevens noted that *Hamdan's* tribunal was not "appointed by a commander in the field of battle, but by a retired major general stationed away from any active hostilities, . . . [and] he was not being tried for any act committed in the theatre of war."⁷

Justice Stevens, writing for the Court, returned to the theme of military necessity when discussing the statutory requirement that procedures for military commissions must be the same as those used to try American soldiers in courts-martial (which they clearly were not) unless the administration could demonstrate that the court-martial procedures would not be "practicable." The Court emphasized the military necessity that comes from battlefield exigencies, stating that the statute "did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool." The requirement that any deviation be necessitated by a showing of impracticability of court-martial procedures "strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in *the theatre of war*."⁸ In short, the justices both reviewed and decisively rejected the claim of military necessity upon which the lawfulness of the military commissions rested.

Similarly, Justice Anthony Kennedy, in his concurrence, emphasized the Court's finding that no exigency, practical need, or military necessity required the deviation from the normal procedures followed by court-martials. For Justice Kennedy, as with the other justices in the majority, the term "'practicable' cannot be construed to permit deviations based on mere convenience or expedience."⁹ Hamdan had been detained for four years and the government had demonstrated no exigency or evident practical need for departure from court-martial procedures.¹⁰

In contrast, the theme that runs throughout Justice Clarence Thomas's dissent is that the Court's decision constituted an unprecedented departure from the traditionally limited role of the courts with respect to warfare.¹¹ For the dissenters, the Court's determination that Hamdan's trial before a military commission that deviated from court-martial procedures and was not warranted by practical need or military necessity constituted an impermissible intrusion into the executive's power to take appropriate military measures pursuant to the congressional authorization of the use of force against those who aided the terrorist attacks that occurred on September 11, 2001. The dissenters believed that "the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment."¹² For the dissenters, the president has the power to appoint military commissions in exigent and nonexigent circumstances, and the Court should not determine whether such actions are necessary. Nor should the Court decide whether the regular court-martial procedures are "practicable," for "that determination is precisely the kind for which the 'judiciary has neither the aptitude, facilities nor responsibility.'" For Thomas, that decision is reserved to the president by Congress's authorization "to use all necessary and appropriate force against our enemies."¹³ Or, as Justice Antonin Scalia's dissent argues, an order enjoining ongoing military commission proceedings "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal *and ours is virtually nonexistent*."¹⁴

There seems absolutely no reason why the judiciary's competence to evaluate the legality of a military commission is "virtually nonexistent." One would think that the federal judiciary would have a great deal of expertise in analyzing whether deviations from basic principles of judicial procedure are necessary. For example, as Justice Kennedy asks, why should it be necessary to allow the secretary of defense or his political designee to make dispositive decisions during the middle of the trial or appoint the presiding officer at trial—powers which raise concerns about the commission's neutrality? The judiciary is certainly capable of evaluating whether a fair trial is compromised when the government can introduce into evidence statements obtained through the use of coercive interrogation methods prohibited by the Geneva Conventions and U.S. law. Nor is a court incompetent to evaluate the competing claims of fair process and necessity. Moreover, questions such as the scope and interpretation of Common Article 3 of the Geneva Conventions, the historical practice of military commissions, or whether conspiracy is a war crime all seem to be quintessential legal issues of the type courts generally grapple with. Decisions

made in the heat of battle may require speed, secrecy, discretionary judgment, and immediate access to information that military commanders, and not courts, are qualified to make. But none of those attributes characterize the determination of whether military trials undertaken four years after the capture of a prisoner utilize fair, lawful, or necessary procedures. Neither Scalia nor Thomas argues that the administration's military commissions were militarily necessary or that the regular court-martial procedures were impractical, but simply claim that that decision was not for the Court to make.

Similarly, in *Hamdi v. Rumsfeld*, the Court also distinguished between judicial review of detentions on the battlefield and review over indefinite detentions of citizens once they had been removed from the theater of war.¹⁵ The plurality opinion rejected the government's argument that any significant judicial review of a citizen detained as an enemy combatant would have a dire impact on the central functions of warmaking.

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented.¹⁶

Of course, the phrase "actual prosecution of the war" is somewhat vague—and the president argues that virtually everything he does to fight terrorism—electronic surveillance, indefinite detention of prisoners at Guantanamo and elsewhere, or extraordinary rendition—are matters relating to the actual prosecution of the war. But in the context of the opinion, it is clear that the plurality distinguishes military actions taken on or near the battlefield and military decisions about individuals detained far from the actual fighting. The plurality distinguished between "initial captures on the battlefield," which the parties agreed need not receive due process, and the process required "when the determination is made to *continue* to hold those who have been seized."¹⁷ In the latter circumstances, the Court rejected the government's assertion that the Court's role must be "heavily circumscribed."¹⁸ The *Hamdi* plurality made clear that "what are the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions."¹⁹ In ringing words it proclaimed that "we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."²⁰

The Court's decreasing deference to executive wartime determinations made away from the battlefield can also be seen in the *Hamdi*'s plurality emphasis on the narrow "context" of that case: "A United States citizen captured in a *foreign* combat zone."²¹ The plurality's emphasis on *Hamdi*'s battlefield capture came in response to the four dissenters who argued that the president has no power at all—either under the Non-Detention Act or the Constitution—to detain an American citizen as an enemy combatant and suggests that at least some justices in the plurality might have agreed with the dissenters in the case of Jose Padilla, an American citizen who was not captured on a foreign battlefield but rather

detained at the Chicago airport. The administration claims that the “battlefield” in its global war against terrorism is worldwide, including the United States, but the *Hamdi* plurality defined the battlefield in that case as the armed conflict taking place in Afghanistan. While the Fourth Circuit Court of Appeals later concluded that Padilla could be detained as an enemy combatant even though he was detained in the United States because he was at one time “armed and present in a combat zone during armed conflict,” the Second Circuit had reached the contrary conclusion prior to the *Hamdi* decision.²² Apparently the government was sufficiently concerned that the Supreme Court would reverse the Fourth Circuit that they avoided Supreme Court review of Padilla’s case by releasing him from detention as an enemy combatant and charging him with a crime—one having nothing to do with the enemy combatant charge—prior to the Supreme Court’s taking up Padilla’s appeal from the Fourth Circuit ruling.

Finally, in *Rasul v. Bush*, Justice Kennedy’s concurrence again articulates the theme of the absence of direct military necessity which underlies much of the opinions in both *Hamdi* and *Hamdan*. Kennedy argued that the Court’s assertion of habeas jurisdiction over the Guantanamo detainees in that case was warranted in part because the government’s indefinite detention without trial or other legal proceedings of the detainees presented a “weaker case of military necessity. . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”²³ Similar, but unarticulated, reasoning undoubtedly motivated the majority to reject the government’s claim that the assertion of habeas jurisdiction would impermissibly interfere with the president’s ability to wage the war against terrorism.

WAR AND JUDICIAL COMPETENCE

Scholars such as John Yoo or Richard Posner argue for “a light judicial hand in national security matters,” or for the judiciary to abstain altogether in war-time challenges to executive policies (Posner 2006, 35–37; Yoo 1996). Yoo views the *Hamdi* and *Rasul* decisions “as an unprecedented formal and functional intrusion by the federal courts into the executive’s traditional powers” that will take the courts “far beyond their normal areas of expertise” (Yoo 2006, 574–75).

These scholars emphasize the judiciary’s institutional deficiencies in addressing war or national security matters. Judges are generalists, unlike congressional committees or executive bureaucracies that focus on national security issues. The judiciary, unlike the Defense Department or the Senate Foreign Relations Committee, has no machinery for the systematic study of an issue. And Yoo argues that the federal judiciary is a decentralized, slow, deliberate body which erects substantial doctrinal and resource barriers on parties seeking access and whose ability to acquire and process information is more limited than the political branches (Yoo 2006, 592–600).

These critiques of judicial competence in war, national security, or foreign affairs matters ignore central and critical functions of the judiciary that are important both in wartime and times of peace. The judiciary is the one branch uniquely situated to police the legal limits imposed on executive discretion over military or national security matters. While the executive clearly has greater discretion in times of war, its power is not unbounded and still is limited by law. Determining what those legal limits are and how they apply in particular cases are often issues that involve the judiciary's expertise and experience. Issues such as whether the president has the power to detain American citizens as enemy combatants, can hold detainees indefinitely without according them fair hearings, can try detainees by means of military commissions that permit evidence obtained by torture or other coercive means to be admitted, or whether detainees can be subjected to torture or other cruel and inhumane methods of interrogation are not matters beyond the competence of judges.

Moreover, war as well as peace requires structural checks on executive overreaching, perhaps even more so because of the greater dangers of executive aggrandizement of power during wartime. Despite the arguments of those such as Yoo and Posner that either the Congress or executive branch itself can provide adequate checks, this safeguard certainly has not proven adequate during the current conflict against terrorism. Congress has been quiescent, providing virtually no check or oversight of the president's treatment, detention, or proposed military trials of enemy combatants until the Supreme Court entered the fray. Nor has Congress challenged the president's policy of extraordinary rendition, in which the executive sends suspected terrorists to countries where they will be tortured and detained indefinitely without judicial process. Indeed, even after the Supreme Court forced Congress to grapple with the defects of the administration's proposed military commissions, Congress enacted a statute that many senators believed was unconstitutional. The chairman of the Senate Judiciary Committee voted for the statute and justified his vote by stating that "the court will clean it up" (Lithwick and Schragger 2006; *Los Angeles Times* 2006).

Moreover, institutional, legal, and political checks within the executive branch have been even less effective. The Office of Legal Counsel, an institutional check within the Justice Department which is supposed to provide independent legal advice, produced secret memos written by handpicked political appointees providing advice that conformed to the bottom line their superiors desired (Pillard 2006, 1297). When the Bybee Torture Memo, which was never intended to be publicly disclosed, was leaked to the press, the resulting firestorm of criticism caused it to be withdrawn.

This problem is not limited to this administration; for decades the executive branch has sought to keep the legal advising process confidential (Pillard 2006, 1302). Moreover, the administration's discussions of legal strategy after September 11 largely excluded the military lawyers and foreign-policy officials who presumably had the expertise that Yoo or Posner believe places the executive at a comparative advantage over judges in national security matters (Golden 2004, § 1, 1; Mayer 2006). For example, when some of the military

lawyers protested the administration's detainee policies, they were generally ignored by the small coterie of high-level officials who were driving the policies (Mayer 2006). The public deliberation and rational argumentation of differing opinions that characterize judicial proceedings are an institutional strength of the judiciary that has been sorely lacking in the administration's determination of legal strategy in fighting terrorism. While troop movements, battle plans, and military strategies ought to be kept secret and out of the Court's purview, legal issues and strategies, such as the definition of torture, the constitutional authority of the president to violate or suspend treaties or authorize torture, and the applicability of the Geneva Conventions in the current fight against terrorism, are matters best resolved in the course of open dialogue and debate that the judiciary, not the executive, is most institutionally attuned to.

CONCLUSION

The Supreme Court's assertion of judicial power to review the president's enemy combatant policies is consistent with the constitutional design to limit and provide checks on executive power, both in wartime and in peace. It is also consistent with the early judiciary's assertiveness in deciding cases challenging executive wartime decisions. But the Court's decisions nonetheless surprised many observers, perhaps because of the all too often tendency of the modern judiciary to defer to executive wartime decisions.

Commentators have offered various theories to explain the Court's muscular approach to the enemy combatant cases. Perhaps the Court has learned from the lessons of the past; maybe the Court's prior wartime precedents restraining executive power such as *Milligan* or *Youngstown Sheet & Tube* played a role in the Court's reaching the conclusions it did. Or it may be that these decisions are the result of the very slowness of the judicial process that Yoo describes—namely that the delay of three to five years between September 11, and these Court decisions meant that the Court could decide these cases when the sense of crisis had already somewhat passed. It could also be that these decisions are the product of the more general assertiveness of the late-20th-century judiciary. Such explanations have been proffered by various commentators (Waxman 2005, 1).

But perhaps these Court decisions are a reaction to the executive's claim that, in this new kind of war against terror, no law applies to the treatment of enemy combatants. The administration claims that we are at war and that neither the Constitution nor the normal human rights law applicable to peace time governs the treatment of enemy combatants. But at the same time, the administration also argues that the normal laws of war—the Geneva Conventions, the rules governing prisoners of war—do not apply because these prisoners are unlawful enemy combatants and the normal rules of war do not apply to our fight against al Qaeda. According to the administration's assertions, no law governs and whatever treatment is accorded to these prisoners is purely a matter of administration discretion. These prisoners were in what amounted to a legal black hole.

The Court pushed back against the executive's argument that these prisoners could be held totally outside of the rule of law and that there could be no review, or only extremely deferential reviews, of their detention. The administration's argument that this was a new kind of war against a nontraditional enemy ironically suggests that more robust review of the administration's detention policies is required. This new kind of war is likely to drag on for many years, decades, or generations. In this conflict, the traditional boundary lines separating war and peace, civilian and combatant, battlefield and home front have been blurred, perhaps beyond recognition, leading to both a higher chance of military error in deciding who to detain and the possibility of lifetime detention for innocent people erroneously detained. In these circumstances, the need for judicial review is greater than in past wars.

A guiding principle of the U.S. Constitution is that the government is one of limited powers. President Bush claimed virtually unlimited, unchecked power to detain and try people the government believed to be enemy combatants. It fell to the Court to tell the president that he was wrong.

ENDNOTES

1. *Korematsu v. United States*, 323 U.S. 214 (1944).
2. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).
3. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
4. *Ibid.*, 2777.
5. *Ibid.*, 2782.
6. *Ibid.*, 2785.
7. *Ibid.*
8. *Ibid.*, 2793.
9. *Ibid.*, 2801 (Kennedy, J., concurring in part).
10. *Ibid.*, 2805, 2807–08.
11. *Ibid.*, 2826 (Thomas, J., dissenting).
12. *Ibid.*, 2838.
13. *Ibid.*, 2843 (citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 [1948]).
14. *Ibid.*, 2822 (Scalia, J., dissenting) (emphasis added).
15. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
16. *Ibid.*, 535 (plurality opinion).
17. *Ibid.*, 534 (emphasis in original).
18. *Ibid.*, 535.
19. *Ibid.* (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 [1932]).
20. *Ibid.*, 536.
21. *Ibid.*, 523.
22. *Padilla v. Hanft*, 423 F.2d 386 (4th Cir. 2005), cert. denied, 126 S. Ct. 1649 (2006); *Padilla v. Rumsfeld*, 352 F.2d 695 (2d Cir. 2003), rev'd on other grounds, 124 S. Ct. 2711 (2004).
23. *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring).

REFERENCES

- Adler, David Gray. 2006. "The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism," *Presidential Studies Quarterly* 36: 525–40.
- Bradley, Curtis A., and Martin S. Flaherty. 2004. "Executive Power Essentialism and Foreign Affairs," *Michigan Law Review* 102: 545.

- Bush, George W. 2005. "Statement on Signing of H.R. 2863, December 30. The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," *Weekly Compilation of Presidential Documents* 41: 52.
- Dennison, George M. 1974. "Martial Law: The Development of a Theory of Emergency Powers," 1776–1861. *American Journal of Legal History* 18: 52.
- Editorial. 2006. "Careless Congress: Lawmakers Passed a Detainee Law of Doubtful Constitutionality Now They Expect the Courts to Clean It Up," *Los Angeles Times*, November 3, 28.
- Farrand, Max, ed. 1996. *The Records of the Federalist Convention of 1787*, 4 vols., reprint. New Haven, CT: Yale University Press.
- Fisher, Louis. 2006. "Lost Constitutional Moorings: Recovering the War Powers," *Indiana Law Journal* 81: 1199.
- Golden, Tim. 2004. "Threats and Responses: Tough Justice; after Terror, a Secret Rewriting of Military Law," *The New York Times*, October 24, § 1, 1.
- Hamilton, Alexander, James Madison, and John Jay. 1937. *The Federalist*. New York: Modern Library.
- Keynes, Edward. 1982. *Undeclared War, Twilight Zone of Constitutional Power*. University Park, PA: Penn State University Press.
- Jefferson, Thomas. 1810. Letter from Jefferson to Colvin, September 20. In *The Works of Thomas Jefferson*, vol. 11, edited by Paul Leicester Ford. 1905. New York: G. P. Putnam.
- Lithwick, Dahlia, and Richard Schragger. 2006. "Congress Behaving Badly," *The Washington Post*, October 8, B2.
- Lobel, Jules. 1989. "Emergency Power and the Decline of Liberalism," *Yale Law Journal* 98: 1385.
- Locke, John. 1960. *Two Treatises of Government*, edited by P. Laslett. Cambridge, UK: Cambridge University Press.
- May, Christopher. 1989. *In the Name of War: Judicial Review and the War Powers since 1918*. Cambridge, MA: Harvard University Press.
- Mayer, Jane. 2006. "Annals of the Pentagon," *New Yorker*, February 27, 32.
- Pillard, Cornelia. 2006. "Unitariness and Myopia: The Executive Branch, Legal Process and Torture," *Indiana Law Journal* 81: 1297.
- Posner, Richard A. 2006. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. New York: Oxford University Press.
- Richardson, J., ed. 1897. *Compilation of the Messages and Papers of the Presidents*, vol. 1. New York: Bureau of National Literature.
- Savage, Charlie. 2006. "Bush Could Bypass New Torture Ban," *Boston Globe*, January 4, A1.
- Schlesinger, Arthur. 1973. *The Imperial Presidency*. Boston: Houghton Mifflin.
- Sofaer, Abraham. 1976. "The Presidency, War, and Foreign Affairs: Practice under the Framers," *Law & Contemporary Problems* 40: 12.
- Sofaer, Abraham. 1981. "Emergency Power and the Hero of New Orleans," *Cardozo Law Review* 2: 233.
- U.S. Department of Defense. 2003. "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4. Available from <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>.
- U.S. Department of Justice. 2002a. Memorandum from John Yoo, deputy assistant attorney general and Robert J. Delahunty, special counsel, to William J. Haynes II, general counsel, Department of Defense, re: Application of treaties and laws to al Qaeda and Taliban detainees. January 9. Available from <http://www.texscience.org/reform/torture/yoo-delahunty-9jan02.pdf>.
- U.S. Department of Justice. 2002b. Memorandum from Jay S. Bybee, assistant attorney general, Office of Legal Counsel, to Alberto R. Gonzales, counsel to the president, re: Standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A. August 1. Available from <http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf>.
- U.S. Department of Justice. 2004. Memorandum from Daniel Levin, acting assistant attorney general, Office of Legal Counsel, to James B. Comey, deputy attorney general, re: Legal standards applicable under 18 U.S.C. §§ 2340–2340A. December 30. Available from <http://www.usdoj.gov/olc/dagmemo.pdf>.

- U.S. Department of Justice. 2006a. "Legal authorities Supporting the Activities of the National Security Agency Described by the President," January 19. Reprinted in *Indiana Law Journal* 81: 1374, 1376. Also available from <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.
- U.S. Department of Justice. 2006b. *Hamdan v. Rumsfeld*. Brief for respondents.
- Waxman, Seth P. 2005. *The Combatant Detention Trilogy through the Lenses of History in Terrorism, the Laws of War, and the Constitution*, edited by Peter Berkowitz. Stanford, CA: Hoover Institution Press.
- Wilmerding, Lucius, Jr. 1952. "The President and the Law," *Political Science Quarterly* 67: 321.
- Yoo, John C. 1996. "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84: 167.
- Yoo, John C. 2006. "Courts at War," *Cornell Law Review* 91: 573.

Reading 38

President Obama's War in Libya

LOUIS FISHER

The Obama administration offered a number of remarkable legal and constitutional justifications for initiating military operations against the government of Libya. It claimed that the President may obtain "authorization" not from Congress but from the U.N. Security Council, and may rely on NATO for additional "authorization." Moreover, military operations in Libya did not amount to "war" and those operations did not constitute "hostilities" within the meaning of the War Powers Resolution. Other interesting issues: the administration's reliance on S. Res. 85 for legislative support, references to "non-kinetic assistance," and the claim that the administration received a "mandate" to act militarily from such sources as the Security Council, the "Libyan people," and a "broad coalition" including the Arab League.

PRESIDENTIAL DOUBLETALK¹

Fundamental to the Constitution is the framers' determination that Congress alone can initiate and authorize war. To secure the principle of self-government and popular sovereignty, the decision to take the country from a state of peace to a state of war is reserved to the elected members of Congress. The framers recognized that the President could exercise defensive powers "to repel sudden attacks."²

John Jay expressed the framers' intent with these plainspoken words: "It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get

Source: Original essay written for this article based on Statement by Louis Fisher, The Constitution Project, Before the Senate Committee on Foreign Relations, "Libya and War Powers" June 28, 2011. Used by Permission of Louis Fisher.

nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”³ Professor Michael J. Glennon, in an analysis of the war in Libya, recently underscored that the Constitution “places the decision to go to war in the hands of Congress.”⁴

It might be argued that what the framers said in the 1780s reflected a fear of monarchical adventures that have no application to the American political system and its strong legislative branch, independent judiciary, and a commitment to checks and balances. However, what the framers focused on was human nature, especially the executive appetite for war. Human nature in the twenty-first century is not that different from human nature in the eighteenth century, as we have seen in wars after 1945, including Korea, Vietnam, and Iraq in 2003.

From 1789 to 1950, all wars involving the United States were either authorized or declared by Congress. That pattern of 160 years changed abruptly when President Harry Truman unilaterally took the country to war against North Korea. Unlike all previous Presidents, he did not go to Congress to seek statutory authority. He and his aides did what other Presidents have done to expand their control over the war power. They go to great lengths to explain to Congress and the public that what they are doing is not what they are doing. President Truman was asked at a news conference if the nation was at war. He responded: “We are not at war.” A reporter inquired if it would be more correct to call the military operations “a police action under the United Nations.” Truman quickly agreed: “That is exactly what it amounts to.”⁵ There are many examples of Presidents and executive officials being duplicitous with words. A price is paid for that conduct, both for the President and the country. Korea became “Truman’s War.”

During Senate hearings in June 1951 on the military conflict in Korea, Secretary of State Dean Acheson conceded the obvious by admitting “in the usual sense of the word there is a war.”⁶ What sense of the word had he been using? Federal and state courts had no difficulty in defining the hostilities in Korea as war. They were tasked with interpreting insurance policies that contained the phrase “in time of war.” A federal district court noted in 1953: “We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war.”⁷

In August 1964, President Lyndon Johnson told the nation about a “second attack” in the Gulf of Tonkin, a claim that was doubted at the time and we now know was false.⁸ In 2005, the National Security Council released a study that concluded there was no second attack. What had been reported as a second attack consisted of late signals coming from the first.⁹ Johnson used stealth and deception to escalate the war, forever damaging his presidency. He learned that being a War President is not the same as being a Great President.

In 1998, during a visit to Tennessee State University, Secretary of State Madeleine Albright took a question from a student who wanted to know how President Bill Clinton could go to war against Iraq without obtaining authority from Congress. She explained: “We are talking about using military force,

but we are not talking about a war. That is an important distinction.”¹⁰ Iraqis subjected to repeated and heavy bombings from U.S. cruise missiles understood the military operation as war. These distinctions can be easily manipulated to meet the political needs of the moment.

The above examples provide some context for understanding the efforts of the Obama administration to define and redefine such words as “authorization,” “war,” “hostilities,” “non-kinetic,” and “mandate.”

OBAMA'S POSITION ON THE WAR POWER

During his presidential campaign in 2007 and 2008, Obama spoke of his opposition to the war in Iraq but his support for military actions in Afghanistan. His understanding of the war power and the scope of independent presidential power are further developed in his book, *The Audacity of Hope* (2006), an interview with the *Boston Globe* in 2007, and his Nobel speech in December 2009.

At one point in the book, when speaking about the Constitution, he warned of the “disregard of the rules and the manipulation of language to achieve a particular outcome.”¹¹ Once in the White House, he and his administration would disregard rules and manipulate language to further the war in Libya. He wrote about “the erosion of Congress’s power to declare war” but proceeded to erode it further with his initiatives in Libya.¹² He viewed democracy “not as a house to be built, but as a conversation to be had,” and explained that the Constitution’s “elaborate machinery—its separation of powers and checks and balances and federalist principles and Bill of Rights—are designed to force us into a conversation, a ‘deliberative democracy.’”¹³ With Libya, there were conversations and deliberation with the Security Council, NATO allies, and the Arab League, but not with Congress or the American people.

Later in the book, Obama criticized American foreign policy after World War II for failing to provide “enough deliberation and domestic consensus building.”¹⁴ For some reason, he decided to intervene militarily in Libya without first building a consensus in Congress and the public. With regard to the use of military force, he said that the United States, “like all sovereign nations, has the unilateral right to defend itself against attack.” He also argued that the United States has the right “to take unilateral military action to eliminate an *imminent* threat to our security—so long as an imminent threat is understood to be a nation, group, or individual that is actively preparing to strike U.S. targets.”¹⁵ No such threat came from Libya.

During the presidential campaign, Obama was asked by *Boston Globe* reporter Charlie Savage for his position on several constitutional questions. Consistent with the views above, he said that the President “does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” He added that the President, as Commander in Chief, “does have a duty to protect and defend the United States” and in such instances could act before advising Congress or seeking its consent. He then cautioned: “History has shown us time and again, however, that military action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action.”¹⁶

Further guidance comes from Obama's December 10, 2009 speech at Oslo when accepting the Nobel Peace Prize. Here he went beyond self-defense or the use of military force to stop an imminent attack. He spoke of the concept of a "just war" and humanitarian interventions: "More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region. I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war."¹⁷ He said that as head of state he is "sworn to protect and defend my nation."¹⁸ Actually, his oath of office is quite different. His obligation under Article II is to defend *the Constitution*: "I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

"AUTHORIZATION" FROM THE SECURITY COUNCIL

President Obama and his legal advisers repeatedly claimed that he received "authorization" from the U.N. Security Council to conduct military operations in Libya. On March 21, 2011, he informed Congress that U.S. military forces commenced military initiatives in Libya as "authorized by the United Nations (U.N.) Security Council. . . ."¹⁹ His administration regularly spoke of "authorization" received from the Security Council. As I have explained in earlier studies, it is legally and constitutionally impermissible to transfer the powers of Congress to an international (U.N.) or regional (NATO) body.²⁰ The President and the Senate through the treaty process may not surrender power vested in the House of Representatives and the Senate by Article I. Treaties may not amend the Constitution.

In a May 20, 2011 letter to Congress, President Obama spoke again about "authorization by the United Nations Security Council." He said that congressional action supporting the military action in Libya "would underline the U.S. commitment to this remarkable international effort." Moreover, a resolution by Congress "is also important in the context of our constitutional framework, as it would demonstrate a unity of purpose among the political branches on this important national security matter. It has always been my view that it is better to take military action, even in limited actions such as this, with Congressional engagement, consultation, and support." If that has always been his view, it was his obligation to come to Congress in February 2011 to seek legislative authorization.

"AUTHORIZATION" FROM NATO

On March 28, 2011, in an address to the nation, President Obama announced that after U.S. military operations had been carried out against Libyan troops and air defenses, he would "transfer responsibilities to our allies and partners." NATO "has taken command of the enforcement of the arms embargo

and the no-fly zone.”²¹ Two days earlier, State Department Legal Advisor Harold Koh spoke of this transfer to NATO: “All 28 allies have also now authorized military authorities to develop an operations plan for NATO to take on the broader civilian protection mission under Resolution 1973.”²² The May 20 letter from President Obama to Congress explained that by April 4 “the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the coalition’s efforts.”

Nothing in these or any other communications from the administration could identify a source of authorization from NATO for military operations. Like the UN Charter, NATO was created by treaty. The President and the Senate through the treaty process may not shift the authorizing function from Congress to outside bodies, whether the Security Council or NATO. Section 8 of the War Powers Resolution specifically states that authority to introduce U.S. armed forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances “shall not be inferred . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.”²³ The authorizing body is always Congress, not the Security Council or NATO.

MILITARY OPERATIONS IN LIBYA: NOT A “WAR”

The Obama administration has been preoccupied with efforts to interpret words beyond their ordinary and plain meaning. On April 1, 2011, the Office of Legal Counsel reasoned that “a planned military engagement that constitutes a ‘war’ within the meaning of the Declaration of War Clause may require prior congressional authorization.” But it decided that the existence of “war” is satisfied “only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a significant period.”²⁴ Under that analysis, OLC concluded that the operations in Libya did not meet the administration’s definition of “war.” If U.S. casualties can be kept low, no matter the extent of physical destruction to another nation and loss of life, war to OLC would not exist within the meaning of the Constitution.

If another nation bombed the United States without suffering significant casualties, would we call it war? Obviously we would. When Pearl Harbor was attacked on December 7, 1941, the United States immediately knew it was at war regardless of the extent of military losses by Japan. Launching hundreds of Tomahawk missiles from U.S. ships in the Mediterranean and ordering air strikes against Libyan ground forces, all for the purpose of helping rebels overthrow Colonel Qaddafi, constitutes war. Any nation that directed Tomahawk missiles or their equivalent into New York City or Washington, D.C., would be committing war against the United States.

NO “HOSTILITIES” UNDER THE WPR

In response to a House resolution passed on June 3, 2011, the Obama administration on June 15 submitted a report to Congress. A section on legal analysis (p. 25) determined that the word “hostilities” in the War Powers Resolution should be interpreted to mean that hostilities do not exist with the U.S. military effort in Libya: “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.”

This interpretation ignores the political context for the War Powers Resolution. Part of the momentum behind passage of the statute in 1973 concerned the decision by the Nixon administration to bomb Cambodia.²⁵ The massive air campaign did not involve “sustained fighting or active exchanges of fire with hostile forces,” the presence of U.S. ground troops, or substantial U.S. casualties. However, it was understood that the bombing constituted hostilities.

According to the administration’s June 15 report, if the United States conducted military operations by bombing at 30,000 feet, launching Tomahawk missiles from ships in the Mediterranean, and using armed drones, there would be no “hostilities” in Libya under the terms of the War Powers Resolution, provided that U.S. casualties were minimal or nonexistent. Under the administration’s June 15 report, a nation with superior military force could pulverize another country (perhaps with nuclear weapons) and there would be neither hostilities nor war. The administration advised Speaker John Boehner on June 15 that “the United States supports NATO military operations pursuant to UNSCR 1973”²⁶ By its own words, the Obama administration was supporting hostilities.

Although OLC in its April 1 memo supported President Obama’s military actions in Libya, despite the lack of statutory authorization, it did not agree that “hostilities” (as used in the War Powers Resolution) were absent in Libya. Deprived of OLC support, President Obama turned to White House Counsel Robert Bauer and State Department Legal Adviser Harold Koh for supportive legal analysis.²⁷ It would have been difficult for OLC to credibly offer its legal justification. The April 1 memo defended the “use of force” in Libya because President Obama “could reasonably determine that such use of force was in the national interest.” OLC also advised that prior congressional approval was not constitutionally required “to use military force” in the limited operations under consideration.²⁸ The memo referred to the “destruction of Libyan military assets.”²⁹

A newspaper story in June 2011 reported that the Pentagon was giving extra pay to U.S. troops assisting with military actions in Libya because they are serving in “imminent danger.” The Defense Department decided in April to pay an extra \$225 a month in “imminent danger pay” to service members who fly planes over Libya or serve on ships within 110 nautical miles of its shores. To authorize such pay, the Pentagon must decide that troops in those places are “subject to the threat of physical harm or imminent danger because

of civil insurrection, civil war, terrorism or wartime conditions.”³⁰ Senator Richard Durbin has noted that “hostilities by remote control are still hostilities.” The Obama administration chose to kill with armed drones “what we would otherwise be killing with fighter planes.”³¹

It is interesting that various administrations, eager to press the limits of presidential power, seem to understand that they may not—legally and politically—use the words “war” or “hostilities.” Apparently they recognize that using words in their normal sense, particularly as understood by members of Congress, federal judges, and the general public, would acknowledge what the framers believed. Other than repelling sudden attacks and protecting American lives overseas, Presidents may not take the country from a state of peace to a state of war without seeking and obtaining congressional authority.

NON-KINETIC ASSISTANCE

Throughout the debate on military action against Libya, the Obama administration attempted to distinguish between “kinetic” and “non-kinetic” actions, with the latter apparently referring to no military force. The March 21, 2011 letter from President Obama to Congress spoke of military actions that were clearly kinetic. U.S. forces had “targeted the Qadhafi regime’s air defense systems, command and control structures, and other capabilities of Qadhafi’s armed forces used to attack civilians and civilian populated areas.”³² Two months later, on May 20, a letter to Congress from President Obama stated: “Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation. . . .” Elements not directly using military force were listed: intelligence, logistical support, and search and rescue missions. However, the letter identified these continued applications of military force: “aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone” and “since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition’s efforts.”³³

SUPPORT FROM S. RES. 85

OLC in its April 1 memo relied in part on legislative support from the Senate: “On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution ‘strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms,’ ‘call[ed] on Muammar Gadhafi to desist from further violence,’ and ‘urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.’”³⁴ Action by “unanimous consent” suggests strong Senate approval for the resolution, with lawmakers actively debating its merits and necessity. But the legislative record provides no support for that

impression. Even if there were evidence of strong involvement by Senators in drafting, debating, and adopting this language, a resolution passed by a single chamber contains no statutory support. A Senate resolution merely expresses the sentiments of one house of Congress. In addition, passage of S. Res. 85 reveals little other than marginal involvement by a few Senators.

Resolution 7 of S. Res. 85 urged the Security Council “to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.” When was the no-fly language added to the resolution? Apparently late in the day. Were Senators adequately informed of this amendment? There is evidence that they were not. The legislative history of S. Res. 85 is sparse. There were no hearings and no committee report. The resolution was not referred to a particular committee. Sponsors of the resolution included ten Democrats (Bob Menendez, Frank Lautenberg, Dick Durbin, Kirsten Gillibrand, Bernie Sanders, Sheldon Whitehouse, Chuck Schumer, Bob Casey, Ron Wyden, and Benjamin Cardin) and one Republican (Mark Kirk).

There was no debate on S. Res. 85. There is no evidence of any Senator on the floor at that time other than Senator Schumer and the presiding officer. Schumer asked for unanimous consent to take up the resolution. No one objected, possibly because there was no one present to object. Senate “deliberation” took less than a minute. When one watches Senate action on C-SPAN, consideration of the resolution began at 4:13:44 and ended at 4:14:19—after 35 seconds. On March 30, Senator John Ensign objected that S. Res. 85 “received the same amount of consideration that a bill to name a post office has. This legislation was hotlined.”³⁵ That is, Senate offices were notified by automated phone calls and e-mails of pending action on the resolution, often late in the evening when few Senators are present. According to some Senate aides, “almost no members knew about the no-fly zone language” that had been added to the resolution.³⁶ At 4:03 pm, through the hotlined procedure, Senate offices received S. Res. 85 with the no-fly zone provision but without flagging the significant change.³⁷ Senator Mike Lee noted: “Clearly, the process was abused. You don’t use a hotline to bait and switch the country into a military conflict.”³⁸ Senator Jeff Sessions remarked: “I am also not happy at the way some resolution was passed here that seemed to have authorized force in some way that nobody I know of in the Senate was aware that it was in the resolution when it passed.”³⁹

THE “MANDATE” FOR MILITARY ACTION IN LIBYA

President Obama’s speech to the nation on March 28, 2011 stated that “the United States has not acted alone. Instead, we have been joined by a strong and growing coalition. This includes our closest allies—nations like the United Kingdom, France, Canada, Denmark, Norway, Italy, Spain, Greece, and Turkey—all of whom have fought by our side for decades. And it includes Arab partners like Qatar and the United Arab Emirates, who have chosen to meet their responsibilities to defend the Libyan people.” Over the month of

March, "the United States has worked with our international partners to mobilize a broad coalition, secure an international mandate to protect civilians, stop an advancing army, prevent a massacre, and establish a no-fly zone with our allies and partners."⁴⁰ Missing from this coalition and mandate was the institution of Congress. President Obama in this speech spoke of "a plea for help from the Libyan people themselves."⁴¹ He offered his support "for a set of universal rights, including the freedom for people to express themselves" and for governments "that are ultimately responsive to the aspirations of the people."⁴² Yet throughout this period there had been no effort by President Obama or his administration to listen to the American people or secure their support.

On May 20, 2011, in a letter to Congress, President Obama said that he acted militarily against Libya "pursuant to a request from the Arab League and authorization by the United Nations Security Council." The administration's June 15 submission to Congress claimed that President Obama acted militarily in Libya "with a mandate from the United Nations." There is only one permitted mandate under the U.S. Constitution for the use of military force against another nation that has not attacked or threatened the United States. That mandate must come from Congress.

Senate Joint Resolution 20, introduced on June 21, 2011, was designed to authorize the use of U.S. armed force in Libya. In two places the resolution used the word "mandate." Security Council Resolution 1970 "mandates international economic sanctions and an arms embargo." Security Council Resolution 1973 "mandates 'all necessary measures' to protect civilians in Libya, implement a 'no-fly zone', and enforce an arms embargo against the Qaddafi regime." The Security Council cannot mandate, order, or command the United States. Under the U.S. Constitution, mandates come from laws enacted by Congress.

The Senate Foreign Relations Committee marked up S. J. Res. 20 on June 28 and expected to bring it to the floor for action two days later. A cloture motion had been prepared in case of an attempted filibuster. However, strong objections were raised to giving the issue of Libya priority over the competing concerns about the federal debt. On July 5, Majority Leader Harry Reid agreed to withdraw the motion to proceed to the joint resolution. Senator Bob Corker identified another reason not to take it up: "If the resolution we are debating, possibly this evening, were to actually be debated and passed, it would not affect one iota of what we are doing in Libya. The fact is the House has already turned down the same resolution."⁴³ Reid accepted the mood of the Senate: "we have agreed that, notwithstanding the broad support for the Libya resolution, the most important issue for us to focus on this week is the budget."⁴⁴

CONCLUSIONS

Presidents have some discretion to use military force without advance congressional authorization, such as repelling sudden attacks. That justification has no application to the war in Libya. America was not threatened or attacked

by Colonel Qaddafi. President Obama called the military operation a humanitarian intervention that serves the national interest. Nothing in the Constitution authorizes a single public official, including the President, to unilaterally decide the national interest, especially one involving war and the expenditure of funds.

To restore constitutional government, Congress and the public must confront Presidents who commit troops to foreign wars without seeking legislative authority. No action by a President would more warrant impeachment and removal from office than usurping the war power from Congress and undermining representative government and the system of checks and balances. Members of Congress need to understand their institutional duties and discharge them, safeguarding not only their own powers but those of their constituents. Lawmakers take an oath to support and defend the Constitution, not the President.

ENDNOTES

1. For readers who may regard this subhead as disrespectful of Presidents, doubletalk is defined as "language that appears to be earnest and meaningful but in fact is a mixture of sense and nonsense; inflated, involved, and often deliberately ambiguous language." For presidential deception on war powers from James Polk to the present, see Louis Fisher, "When Wars Begin: Misleading Statements by Presidents," 40 *Pres. Stud. Q.* 171 (2010), available at <http://www.loufisher.org/docs/wi/432.pdf>.
2. The Records of the Federal Convention of 1787, at 318–19 (Max Farrand, ed. 1966).
3. John Jay, *Federalist* No. 4, *The Federalist* 101 (Benjamin F. Wright, ed., MetroBooks 2002).
4. Michael J. Glennon, "The Cost of 'Empty Words': A Comment on the Justice Department's Libya Opinion," *Harv. Sec. J. Forum*, April 14, 2011, at 7, available at <http://harvardnsj.com/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion>.
5. Public Papers of the Presidents, 1950, at 504. On July 13, at a news conference, President Truman again called the Korean War a "police action." *Id.* at 522.
6. "Military Situation in the Far East" (Part 3), hearings before the Senate Committees on Armed Services and Foreign Relations, 82d Cong., 1st Sess. 2014 (1951).
7. *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953). See also *Gagliomella v. Metropolitan Life Ins. Co.*, 122 F.Supp. 246 (D-Mass. 1954); *Carius v. New York Life Insurance Co.*, 124 F.Supp. 388 (D. Ill. 1954); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554 (Tex. 1953); and A. Kenneth Pye, "The Legal Status of the Korean Hostilities," 45 *Geo. L. J.* 45 (1956).
8. Louis Fisher, *Presidential War Power* 129–33 (2d ed. 2004).
9. Robert J. Hanyok, "Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964," *Cryptologic Quarterly*, declassified by the National Security Agency on November 3, 2005, available at http://www.nsa.gov/public_info/_files/gulf_of_tonkin/articles/rel_1_skunks_bogies.pdf.
10. Barton Gellman, "Students Receive Albright Politely," *Washington Post*, February 20, 1998, at A19.
11. Barack Obama, *The Audacity of Hope* 94 (2008 ed. paperback edition).
12. *Id.* at 105.
13. *Id.* at 110.
14. *Id.* at 338.
15. *Id.* at 364–65 (emphasis in original).
16. "Barack Obama's Q&A," available at <http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>.

17. <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> at 3.
18. *Id.* at 2.
19. Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, March 21, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.
20. Louis Fisher, "Obama's U.N. Authority?," *National Law Journal*, April 18, 2011, available at <http://www.loufisher.org/docs/wp/authority.pdf>; Louis Fisher, "Sidestepping Congress: Presidents Acting Under the UN and NATO," 47 *Case Western Res. L. Rev.* 1237 (1997), available at <http://www.loufisher.org/docs/wp/424.pdf>; Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," 89 *Am. J. Int'l L.* 21 (1995), available at <http://www.loufisher.org/docs/wp/425.pdf>.
21. Remarks by the President in Address to the Nation on Libya, March 28, 2011, at 2, available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.
22. Harold Hongju Koh, Legal Advisor U.S. Department of State, "Statement Regarding Use of Force in Libya," March 26, 2011, appearing before the American Society of International Law Annual Meeting, at 2, available at <http://www.state.gov/s/l/releases/remarks/159201.htm>.
23. 87 Stat. 555, 558, sec. 8(a)(2) (1973).
24. U.S. Justice Department, Office of Legal Counsel, "Authority to Use Military Force in Libya," April 1, 2011, at 8, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.
25. Thomas F. Eagleton, *War and Presidential Power: A Chronicle of Congressional Surrender* 150-83 (1974).
26. Letter from the Department of State and Department of Defense to Speaker John A. Boehner, June 15, 2011, at 1.
27. Charlie Savage, "2 Top Lawyers Lose Argument on War Power," *New York Times*, June 18, 2011, at A1.
28. OLC Opinion, *supra* note 24, at 1.
29. *Id.* at 6.
30. David A. Fahrenthold, "Obama's Reasoning on Libya Criticized," *Washington Post*, June 21, 2011, at A8.
31. *Id.*
32. March 21, 2011 letter, *supra* note 19, at 2.
33. President Obama's Letter About Efforts in Libya, May 20, 2011, sent to Senate and House leaders John A. Boehner, Nancy Pelosi, Harry Reid, and Mitch McConnell, at 1.
34. OLC Opinion, *supra* note 24, at 2.
35. 157 Cong. Rec. S1952 (daily ed. March 30, 2011).
36. Conn Carroll, "How the Senate was Bait and Switched into War," <http://washingtonexaminer.com/print/blogs/beltway-confidential/2011/04-how-senate-was-bait-and-switched-war>.
37. *Id.*
38. *Id.*
39. 157 Cong. Rec. S2010 (daily ed. March 31, 2011).
40. Remarks by the President in Address to the Nation on Libya, March 28, 2011, at 2, *supra* note 21.
41. *Id.* at 3.
42. *Id.* at 4.
43. 157 Cong. Rec. S4314 (daily ed. July 5, 2011).
44. *Id.* at S4319.

Evaluating Presidents: Greatness and Abuse of Power

The presidency looms large in American politics, and Americans have delegated much power to their presidents. This power is not only legal and constitutional; it is also the power to affect our well-being, whether by influencing the economy or by taking the nation to war. One of the more profound presidential powers, however, is the effect that presidents have on our national psychology—whether we are complaining about how bad things are or are inspired to press on to make progress in solving the very real problems that our nation constantly faces. Thus, the questions of presidential greatness and abuse of power are important issues for the United States. Presidents can call forth from Americans their best efforts and most positive instincts, and they can lead us into cynicism when they betray our trust. This section considers the issue of public attitudes toward presidents, and the various selections tell us about the importance of public trust in our presidents.

In the first selection, James P. Pfiffner puts into perspective three major scandals of the modern presidency: Watergate, Iran-Contra, and the impeachment of President Clinton. Each of these three crises called into question the judgment of the presidents involved, raised issues of impeachment, and were caused by the individual presidents themselves—not by their political “enemies.” In examining the basic facts of each case, Pfiffner analyzes each president’s motives and the consequences of his actions. He points out the irony that each president was hurt more by his initial denials and cover-up than if he had immediately admitted the truth about his previous behavior. But more profoundly, none of the breaches of trust of these presidents was necessary or achieved the goals that the presidents sought. This selection serves as a reminder that the power we place in the presidency can raise significant temptations for abuse, and that the “auxiliary precautions” of which James Madison wrote in *Federalist Number 51* are still necessary.

The selection by Thomas Cronin and Michael Genovese raises explicitly the paradox that our chief executive must be powerful enough to lead the

country yet must also be accountable to the people. The beginning of their title, “If Men Were Angels,” comes from James Madison’s classic formulation in *Federalist Number 51*:

If men were angels, no government would be necessary. If angels were to govern man, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The authors observe that Americans yearn for strong leaders who will take charge and lead them where they want to go, but they also point out the “anti-government, anti-leadership, chronic-complainer syndrome” that is an inherent part of the American political tradition. They argue that one of the ways to tie the American government more closely to the American people is a strong political party system that would help overcome gridlock and make the government more responsive to the electorate. Ultimately, they argue, the American political system depends upon the quality of the citizenry. If citizens are engaged with their government, we can have both a strong presidency and democratic accountability; both are necessary for a successful polity.

In the next selection, Stephen Wayne analyzes President Obama’s character and judgment in the context of two major policy decisions early in his presidency: the decision to escalate the war in Afghanistan and the decision to seek comprehensive health care reform legislation. Wayne concludes that Obama’s personality determined his decision-making style: Obama was thoughtful, careful, and deliberative in his approach to policy problems. He tapped the skills of experts and was willing to compromise in order to arrive at a consensus. While his opponents accused Obama of being too rigid, many of his supporters felt that he was too willing to compromise.

In the final selection in the book, Andrew Rudalevige presents a historical overview of presidential power, with an emphasis on the modern presidency. He makes it clear that the issue is not a simple one and that the American people want the president to have sufficient power to be able to act to protect national security, but that they are also suspicious of executive power that might be used to infringe upon civil liberties held dear by Americans. The balance of power between Congress and the president has been a continuing theme in American politics, and during the Bush presidency the pendulum swung toward the president.

SELECTED BIBLIOGRAPHY

- Abshire, David, *Saving the Reagan Presidency* (College Station, TX: Texas A&M University Press, 2005).
- Bailey, Thomas A., *Presidential Greatness* (New York: Appleton-Century-Crofts, 1966).
- Barber, James David, *The Presidential Character*, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1992).

- Barger, Harold M., *The Impossible Presidency* (Glenview, IL: Scott, Foresman, 1984).
- Bose, Meena, and Mark Landis, *The Uses and Misuses of Presidential Ratings* (NY: Nova Science, 2003).
- Brace, Paul, and Barbara Hinckley, *Follow the Leader* (New York: Basic Books, 1992).
- Edwards, George C., and Philip John Davies, *New Challenges for the American Presidency* (NY: Longman, 2004).
- Genovese, Michael, *The Presidential Dilemma* (New York: HarperCollins, 1995).
- Lowi, Theodore, *The Personal President* (Ithaca, New York: Cornell University Press, 1985).
- Mansfield, Harvey C., *Taming the Prince* (New York: Free Press, 1989).
- Pfiffner, James P., *The Character Factor: How We Judge America's Presidents* (College Station: Texas A&M University Press, 2004).
- Rockman, Bert A., *The Leadership Question: The Presidency in the American System* (New York: Praeger, 1984).
- Rudalevige, Andrew, *The New Imperial Presidency* (Ann Arbor: University of Michigan Press, 2005).
- Schlesinger, Arthur M. Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

Reading 39

Three Crises of Character in the Modern Presidency

JAMES P. PFIFFNER

Three major crises of confidence have shaken the modern presidency—Watergate, Iran-Contra, and President Clinton’s impeachment—each of them caused not by external threats but by presidential decisions. Each of them led to serious consideration of impeachment and removal of the president from office: Nixon resigned in the face of virtually certain impeachment; Reagan saved himself by getting the truth out; and Clinton was impeached though not removed from office.¹

These crises were rooted in the character of the presidents involved. Watergate was based in Richard Nixon’s resentment of his political “enemies” and his paranoia about how they were thwarting him. He was willing to use illegal tactics in order to get back at his political enemies, and he was willing to lie to cover up the illegal actions. The diversion of funds to the Contras was allowed to happen because President Reagan either did not care or did not bother to find out what his subordinates were doing in his name. Bill Clinton was impeached, because he was willing to risk an illicit relationship and was unwilling to take responsibility for his behavior. He was willing to lie about it and encourage others to lie for him.

Each of the cases will be examined from the perspective of the president’s motives, what happened in the crisis, and its consequences. The three cases will then be compared with respect to the key presidential decisions, the ironies of the outcomes, the personal culpability of each president, and finally the relative threats to the Constitution and the polity presented by the crises. The conclusion will be that each of the three presidents was guilty of serious missteps, but that President Reagan handled his crisis better by taking serious steps to get the truth out and that President Clinton’s transgressions did not present as serious a threat to the Constitution as the other two crises.

WATERGATE

What Happened

One key turning point came early in President Nixon’s administration when Daniel Ellsberg, a former defense analyst, leaked to the media a lengthy internal analysis of early U.S. policy toward Vietnam. The collection of documents became known as the “Pentagon Papers” and was concerned with policymaking before Nixon became president. Nixon decided that the release of the

Source: Essay prepared for this volume. Revised from essays in David Abshire, ed. *Triumphs and Tragedies of the Modern Presidency*, ed. David Abshire (Washington: Center for the Study of the Presidency, 2001). Used by permission of James Pfiffner.

documents was an unacceptable breach of security and ordered his aides to do something about it. In 1969, he told John Ehrlichman to establish “a little group right here in the White House. Have them get off their tails and find out what’s going on and figure out how to stop it.”² This “little group” became the “plumbers” who would figure out how to stop leaks and carry out other tasks of political intelligence and sabotage.

In order to discredit Daniel Ellsberg, Nixon operatives broke into the office of his psychiatrist in Los Angeles. Though they did not find anything useful, their intention probably was to find and release embarrassing information about Ellsberg in order to affect his trial for violating security regulations. Breaking and entering is, of course, a crime, and this attempt to deprive Ellsberg of his civil rights was included in Article II of the House Judiciary Committee impeachment charges. Nixon also encouraged breaking into the Brookings Institution to seize documents of those he thought were working on the Pentagon Papers.

The plumbers, who were funded from campaign funds and through the Committee to Reelect the President (CREEP), were to undertake a number of political intelligence operations, including the bugging of the office of Larry O’Brien at the Democratic National Headquarters in the Watergate Building. The political parties’ national headquarters are not the most likely places to find valuable political intelligence, and the Nixon people probably were more interested in finding an illegitimate connection between Larry O’Brien and Howard Hughes. After the election in 1968, Nixon had received an illegal campaign contribution from Howard Hughes. But at the same time Hughes also paid Larry O’Brien on a retainer. Thus, information about the O’Brien-Hughes connection could be used to counter any Democratic disclosure or condemnation of the Nixon-Hughes connection.³

On the night of June 17, 1972, five of the plumbers, under the direction of Howard Hunt and Gordon Liddy, broke into the Democratic National Committee (DNC) headquarters in the Watergate building to repair a listening device they had previously set. After they were discovered and arrested, the trail led back to CREEP and the White House. The cover-up of this break-in was what eventually brought down President Nixon.

In addition to these events, the Nixon White House and reelection campaign undertook a number of other measures that are broadly covered under the rubric of Watergate. Among these were “dirty tricks” to affect the 1972 Democratic primary elections. Because Nixon judged that Senator Edmund Muskie would be his strongest opponent, his operatives tried to undermine Muskie’s campaign by disrupting campaign rallies, forging letters, and financing his opponents.⁴ White House officials tried to get the Internal Revenue Service (IRS) to undertake audits on Democratic opponents and their supporters. A plan for political intelligence and operations was approved by Nixon but never implemented.⁵ Nixon’s counsel, John Dean, and others drew up lists of political “enemies” who were to be targets of political retaliation.

Among all of these illicit activities, what eventually brought down President Nixon was his involvement with the cover-up of the crimes. Nixon never

seemed to consider seriously the possibility of denouncing the break-in and promising that the White House would not conduct any such activities in the future. Nixon's lawyer, Leonard Garment, recalled:

The transition from bungled break-in to cover-up took place automatically, without discussion, debate, or even the whisper of gears shifting, because the president was personally involved, if not in the Watergate break-in then by authorizing prior Colson and plumber activities like the Ellsberg break-in and a crazy Colson plot to firebomb the Brookings Institution in order to recover a set of the Pentagon Papers. These were potentially more lethal than Watergate. Other factors contributed to the cover-up, but I have no doubt that the main motive was Nixon's sense of personal jeopardy. His decision was not irrational, though it turned out terribly wrong.⁶

In retrospect, Nixon argued that the actions of Watergate participants themselves were minor, but the cover-up was his big mistake.⁷ But he was wrong; the illegal activities, including breaking and entering, conducted by a secret White House intelligence unit, were serious abuses of power. That is why Nixon felt that the Watergate break-in had to be concealed at all costs. A thorough investigation of Watergate would have opened up the whole "can of worms" that included the other illegal abuses of power in the Nixon White House. And that, in fact, is what did happen to the Nixon administration.

The Consequences

When the Watergate burglars were arrested, they did not admit that they were working for Nixon's reelection campaign, because they had been assured by Gordon Liddy that they would be taken care of and their prison sentences would be minor if it came to that. But Judge "Maximum John" Sirica gave them long prison sentences because he suspected that their silence was protecting their superiors. This led to John Dean's discussion with the president about hush money for the jailed plumbers. Dean told the president that it might cost \$1 million to keep them quiet. Nixon replied: "We could get that. On the money, if you need the money you could get that. You could get a million dollars. You could get it in cash. I know where it could be gotten."⁸ John Dean testified that \$500,000 did go to Liddy and his men.⁹

The Senate Watergate Committee investigated many aspects of the White House activities and found out that President Nixon had set up a taping system in the White House. The tapes were subpoenaed by the special prosecutor and the House Impeachment Committee. Nixon sent to the committee transcripts of the tapes, but they had been altered in key places. Finally, the Supreme Court ruled that Nixon could not withhold the evidence on the tapes. The turning point in the House came when the "smoking gun" tape was discovered. Until that time, many Republican members of the committee had argued that the evidence against Nixon was not conclusive and impeachment so serious a step that only conclusive proof of a crime was sufficient to vote in favor of impeachment.

In the tape of a conversation on June 23, 1972; just five days after the Watergate break-in, H. R. Haldeman told the president that FBI investigators were tracing the money carried by the Watergate burglars and were about to discover that it had come from CREEP and White House safes. He suggested that the way to stop the FBI-investigation would be to have the CIA tell the FBI that further investigations would jeopardize CIA operations, and they should drop the money trail. Haldeman suggested that "the way to handle this now is for us to have Walters [of the CIA] call Pat Gray [Director of the FBI] and just say, 'Stay the hell out of this . . . this is ah, business here we don't want you to go any further on it.'" After this suggestion, Nixon told Haldeman to tell CIA director Richard Helms, "the president believes that it is going to open the whole Bay of Pigs thing up again. And . . . that they [the CIA] should call the FBI in and [unintelligible] don't go any further into this case period!"¹⁰

The release of the tapes and their damning evidence provided the final impetus for the House Judiciary Committee to vote articles of impeachment. Article I charged the president with failure to fulfill his oath of office and obstruction of justice. It mentioned specifically the break-in of Ellsberg's psychiatrist's office, misuse of the CIA to obstruct the Justice Department investigation, withholding evidence, and counseling perjury, among other things. Article II charged the president with failing to faithfully execute the laws by using the IRS to harass his political opponents, by using the FBI to place unlawful wiretaps on citizens, by maintaining a secret investigative unit in the White House paid for by campaign funds, and by impeding criminal investigations, among other things. Article III charged the president with refusing to honor congressional subpoenas lawfully issued by the House Judiciary Committee and impeding the Congress from constitutionally exercising its impeachment powers.

Two other articles were debated by the committee but rejected. One of the articles would have charged that the president, through the secret bombing of Cambodia during the Vietnam War, undermined the constitutional powers of Congress. The other article would have charged the president with income tax evasion when he backdated his report of the gift of his vice presidential papers to the national archives.¹¹ However, before the articles could be represented to the full House for action, President Nixon resigned and left office on August 9, 1974.

IRAN-CONTRA

What Happened

In 1984 and 1985, seven U.S. hostages were kidnapped in Lebanon by Shiite Muslims closely connected to the leaders of Iran. Iran and Iraq were at war, and Iran had a desperate need for military equipment and spare parts to fix its weapons, many of which came from the United States during the period it supported the Shah of Iran. Intermediaries proposed a deal that would include the release of the hostages in exchange for the United States supplying spare airplane parts and missiles to Iran.

President Reagan had become extremely concerned with the plight of the hostages, one of whom was a CIA station chief. His concern was reflected by National Security Council (NSC) staffers, who made arrangements to exchange U.S. arms and spare parts for Iranian intervention to have the hostages in Lebanon released. NSC staffers also argued that it was important to try to reestablish U.S. ties to moderates in Iran so that when the Ayatollah Khomeini died, the U.S. would have some influence in Iran, which the U.S. did not want to fall under Soviet influence. Israel also wanted to support Iran in its war with Iraq, which Israel considered a greater security threat. So Israel agreed to ship arms to Iran, which would then be replaced by the U.S. The U.S. also shipped TOW missiles and HAWK missiles directly to Iran.

The president's decision to trade arms for hostages can be questioned on several grounds. First, the surface rationalization for the policy was to open relations with "moderates" in Iran. But it is doubtful that there were any moderates in powerful positions in Iran at the time. It was the CIA's judgment that Khomeini was in charge and that no one else would be allowed to negotiate with the Americans, especially about weapons.¹² Second, the U.S. had a firm policy not to negotiate with terrorists. In a 1985 speech, President Reagan said that Iran was part of a "... confederation of terrorist states ... a new international version of Murder Inc. America will never make concessions to terrorists."¹³ The Reagan administration had launched "Operation Staunch," a diplomatic campaign to stop U.S. allies in Europe from selling arms to Iran or Iraq.¹⁴

In a number of meetings in the White House, Secretary of State George Shultz and Secretary of Defense Caspar Weinberger argued strenuously against trading arms for hostages (e.g., on 8/6/85, 12/7/85, and 1/7/86).¹⁵ While Weinberger and Shultz may have been right on the merits of the arguments, the elected president clearly had the authority to set policy in the executive branch. Members of the cabinet are merely advisors to the president and implementers of policy, and the president has no obligation to take their advice. On the other hand, sending arms to Iran raised the issue of the Arms Export Control Act of 1976, which prohibited the sale of U.S. arms to nations designated as sponsors of terrorism. Iran had been so designated since 1984. George Shultz asked his legal advisor, Abraham Sofaer, to consider the legality of the arms sale, and Sofaer concluded that such sales would not be legal.¹⁶ In the December 7, 1985 meeting with the president and top aides, Casper Weinberger argued against the sale of arms and argued that it would violate the Arms Export Control Act.¹⁷

In addition, the National Security Act governing covert actions specified that covert actions were to be taken only after an official "finding" by the president that such action is important to national security.¹⁸ National Security Advisor John Poindexter testified before Congress that President Reagan had signed such a finding for the earlier approaches to Iran but that Poindexter had later destroyed it to save the president from possible embarrassment. President Reagan also signed a finding on January 17, 1986 that authorized U.S. direct arms sales to Iran. The law provides that Congress is to be notified before covert

actions are undertaken, or if that is impossible, “in a timely fashion.”¹⁹ Congress did not learn of the arms-for-hostages initiatives until they were disclosed in the Lebanese newspaper, *Al-Shiraa* on November 3, 1986.

The Reagan administration’s actions to gain the release of the hostages over the course of several shipments of arms turned out to be futile. Several hostages were released, but three more hostages were captured. The courting of “moderates” in Iran was not successful because, first, there were no moderates in power and, second, some of the missiles were inferior equipment for which they charged artificially high prices.

In the Contra dimension of the Iran-Contra affair, White House aides, particularly national security advisor, Admiral Poindexter, and staffer Oliver North undertook to use the “profits” received from the sale of missiles to Iran to aid the Contras in Nicaragua. The problem was that Congress had passed, and President Reagan had signed, a law prohibiting the U.S. aid to the Contras. The so-called Boland Amendment (named for its author, Representative Edward P. Boland, D-Mass., chairman of the House Intelligence Committee) stated:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual.

[Public Law 98-473, 98 STAT 1935-37, sec. 8066]

The law had not been passed without due deliberation in Congress. From the beginning of the 1980s, the Reagan administration felt the Sandinista government of Nicaragua posed a serious threat to U.S. national security interests, and support of the Contra opposition was a high priority of the administration. Financial and operational aid was provided to the Contras by the administration, but military aid was subject to a series of limitations written into public law between 1982 and 1986. Despite the best arguments of the Reagan administration, Congress was dubious of the wisdom and efficacy of continuing to arm the Contras. Thus, the Boland Amendment was passed for FY 1985.²⁰

Despite the law, the administration was committed to continuing support of the Contras. President Reagan told national security advisor Robert McFarlane to keep the Contras together, “body and soul.”²¹ NSC staffer Oliver North proposed the “neat idea” of using the money received from the sale of arms to Iran to support the Contras by diverting the money from the U.S. treasury where it should have gone. To carry this out, North and his associates set up secret bank accounts to handle the money.

The Consequences

The secret attempt to fund the Contras was in direct violation of public law and a serious threat to the Constitution. The president’s aides decided that what they could not achieve through the public constitutional process (continuing aid

to the Contras) they would accomplish through secret means. There was no doubt about what the law prohibited; there had been a high level public debate over aid to the Contras throughout the 1980s, and the administration had not been able to convince a majority of the Congress that continued military aid to the Contras in 1985 was essential to U.S. security. But White House aides decided that aid to the Contras ought to continue. There is no doubt that President Reagan strongly supported aid to the Contras and that he communicated this directly to his staff. Reagan, however, denied any knowledge of the diversion of funds to the Contras, and there is no evidence that he knew about it before it was discovered by Attorney General Edwin Meese.

Revelation of arms-for-hostages deals and the diversion of funds to the Contras threw the administration into chaos for a number of months. Opinion polls showed that most Americans believed that President Reagan was lying when he denied that he had traded arms for hostages, and public approval of the president and his administration dropped significantly. Secretary of State Shultz concluded that Poindexter and North:

... had entangled themselves with a gang of operators far more cunning and clever than they. As a result, the U.S. government had violated its own policies on antiterrorism and against arms sales to Iran, was buying our own citizens' freedom in a manner that could only *encourage* the taking of others, was working through disreputable international go-betweens, was circumventing our constitutional system of governance, and was misleading the American people—all in the guise of furthering some purported regional political transformation, or to obtain in actuality a hostage release. And somehow, by dressing up this arms-for-hostages scheme and disguising its worst aspects, first McFarlane, and then Poindexter, apparently with the strong collaboration of Bill Casey, had sold it to a president all too ready to accept it, given his humanitarian urge to free American hostages.²²

Congress held hearings on the affair, and concluded that the affair was a disaster.

In the end, there was no improved relationship with Iran, no lessening of its commitments to terrorism, and no fewer American hostages.

The Iran initiative succeeded only in replacing three American hostages with another three, arming Iran with 2,004 TOWs and more than 200 vital spare parts for HAWK missile batteries, improperly generating funds for the Contras and other covert activities (although far less than North believed), producing profits for the Hakim-Secord Enterprise that in fact belonged to the U.S. taxpayers, leading certain NSC and CIA personnel to deceive representatives of their own Government, undermining U.S. credibility in the eyes of the world, damaging relations between the Executive and the Congress, and engulfing the President in one of the worst credibility crises of an Administration in U.S. history.²³

Although the possibility of impeachment was discussed in both the executive and the legislative branch, it was not pursued by Congress. The feeling in

Congress was that the country was not ready to go through another trauma so soon after the Watergate affair. In addition, there was no evidence that President Reagan knew about the diversion of funds to the Contras before it happened, the most likely grounds for impeachment. The other aspects of the opening to Iran, despite possible illegality, were not serious enough for impeachment proceedings. In addition, President Reagan did not stonewall the investigations, as Presidents Nixon and Clinton did. He established the Tower Board to investigate the matter; he brought in Special Counsel David Abshire to ensure that there would be no cover-up; and when Howard Baker became chief of staff, there was an exhaustive internal investigation.²⁴ He refused to claim executive privilege and turned over documents to the independent counsel and congressional investigators. Thus, President Reagan salvaged his presidency from what might have been far worse consequences.

PRESIDENT CLINTON'S IMPEACHMENT

What Happened

Shortly after graduating from college in June 1995, Monica Lewinsky came to work in the White House as one of many interns. According to her account, she and the president began having an affair in November of that year, and she received a salaried position in the Office of Legislative Affairs. By April 1996, some White House staffers felt she was seeing the president too often and had her transferred to a public affairs job in the Pentagon. Over the next 21 months, White House logs recorded that she was cleared to enter the White House 37 times.²⁵ While at the Pentagon, Lewinsky made friends with a former White House secretary, Linda Tripp, who also worked in the Pentagon. Tripp had been the source for a news story about an encounter between President Clinton and Kathleen Willey in the White House, and when her credibility was questioned by the president's lawyer in the fall of 1997, she began to tape her phone conversations with Lewinsky. The tapes contained assertions by Lewinsky about her relationship with the president and her frustration, because he was not calling her.

In the meantime, the suit brought against the president by Paula Jones had been under way for several years. Jones alleged that in a 1999 encounter in a Little Rock hotel room, then-Governor Clinton had crudely propositioned her and that she had turned him down. The suit was a civil action alleging sexual harassment. In the course of building their case, Jones's lawyers were gathering evidence about other women with whom Clinton might have had relationships over the years in order to demonstrate a pattern of sexual harassment.

The president gave a deposition in the Paula Jones lawsuit on January 17, 1998. With knowledge of the Tripp-Lewinsky tapes, the lawyers for Paula Jones asked Clinton if he had had sex with Lewinsky. When asked about an affair, Clinton denied a sexual relationship, providing the grounds for charges of perjury and eventual impeachment if Starr could prove that they had in fact had a sexual relationship. Having sex with an intern is not illegal (however

wrong it might be), but intentionally lying about it in a civil deposition could constitute perjury. Thus, the question by Jones's lawyers about Lewinsky set Clinton up for a possible perjury charge. Based on the tapes, Starr suspected that Clinton might have tried illegally to cover up their affair.

On January 21, 1998, the story of the tapes and Lewinsky's conversations with Tripp became public, and the media began a feeding frenzy about all aspects of the scandal. President Clinton, in a strong statement, publicly denied that he had a sexual relationship with Lewinsky. "I want you to listen to me. I'm going to say this again. I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie—not a single time, never. These allegations are false. And I need to go back to work for the American people."²⁶

Special Counsel Kenneth Starr's investigation of Clinton continued through the spring and summer of 1998. In July, Starr came to an immunity agreement with Monica Lewinsky, assuring her that she would not be prosecuted based on her testimony about her relationship with Clinton. Lewinsky testified in detail about their relationship and provided evidence that convinced the grand jury that she and Clinton had had a sexual relationship. Based on evidence from the Lewinsky testimony, Starr sought to subpoena the president to testify before a grand jury.

The Consequences

In the face of the subpoena, President Clinton agreed to testify "voluntarily" before Kenneth Starr's grand jury on August 17, 1998, about his relationship with Monica Lewinsky. During four hours of close questioning by Starr's lawyers, President Clinton carefully answered most questions but still maintained that he had not lied in his denial of a sexual relationship with Monica Lewinsky, and the president was clearly equivocating in his answers to some questions about their relationship.

In the evening, after his deposition, however, the president made a statement in a nationally televised broadcast about his testimony. In his statement, he told the nation that he regretted his relationship with Lewinsky and its consequences. "Indeed, I did have a relationship with Miss Lewinsky that was not appropriate. In fact, it was wrong. It constituted a critical lapse in judgment and a personal failure on my part for which I am solely and completely responsible. . . . I know that my public comments and my silence about this matter gave a false impression. I misled people, including even my wife. I deeply regret that." In his statement, Clinton also criticized Kenneth Starr for his relentless pursuit of evidence: "It is time to stop the pursuit of personal destruction and the prying into private lives and get on with our national life."

Several weeks later on September 9, Kenneth Starr sent his report to Congress concerning possible impeachable offenses by President Clinton. The list of charges included allegations that the president had lied under oath in his deposition in the Paula Jones sexual harassment case and in his testimony on August 17, that he had urged Lewinsky and his secretary to lie under oath,

that he tried to obstruct justice by having his secretary hide evidence, and that he had tried to get Ms. Lewinsky a job to discourage her from revealing their relationship.

On October 5, the GOP-controlled House Judiciary Committee voted 21 to 16 along party lines to recommend impeachment hearings. Three days later, on October 8, the full House voted 258 to 176 (with 31 Democrats voting in favor and no Republicans against) to open an impeachment inquiry. On December 11 and 12, the Judiciary Committee voted along party lines in favor of four articles of impeachment. A Democratic motion to censure the president was easily defeated by the Republicans, and the articles were reported out to the full House.

The formal impeachment debate opened on December 18 on the floor of the House of Representatives, with the Republicans arguing that Clinton had corrupted the rule of law by committing perjury and obstructing justice and the Democrats arguing that he should be censured but not impeached. Democrats and moderate Republicans who felt that Clinton's actions were reprehensible, but not impeachable, wanted to vote to censure Clinton. Censure language was proposed by Democrats that harshly condemned Clinton for making "false statements concerning his reprehensible conduct and that he "violated the trust of the American people, lessened their esteem for the office of the president, and dishonored" the presidency.²⁷ But the motions for censure were not successful.

The House of Representatives met on December 19, 1998 and adopted two articles of impeachment. Article I charged that President Clinton "willfully provided perjurious, false and misleading testimony to the grand jury" on August 17, 1998 concerning his relationship with Monica Lewinsky and his attempts to cover it up. Article III charged that President Clinton "prevented, obstructed, and impeded the administration of justice" in order to "delay, impede, cover up, and conceal the existence of evidence and testimony" in the Paula Jones case by encouraging a witness to lie, by concealing evidence, and by trying to prevent truthful testimony by finding a job for Monica Lewinsky. Each of these articles concluded that "William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the presidency, has betrayed his trust as president, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States." The two articles charging perjury in the Paula Jones deposition of January 17 and failure to respond adequately to congressional inquiries were defeated.

The trial in the Senate opened on January 7, 1999. The House impeachment brief argued that the president had indeed committed the crimes charged in the two articles—that he lied under oath before the grand jury investigating him on August 17, 1998 (Article I) and that he attempted to obstruct justice by encouraging Lewinsky to lie about their relationship, concealing evidence, and getting Lewinsky a job. On February 12, 1999, the final votes were taken, and neither of the articles received the two-thirds majority necessary for conviction and removal from office.

COMPARING THREE PRESIDENTS IN CRISES

Each one of these presidents, when faced with potentially damaging public revelations about their behavior, acted initially to limit the political damage to themselves and their administrations; and each chose paths of behavior that would threaten their presidencies. Admitting to the truth of the alleged improper behavior would have damaged their administrations, but their failures to respond truthfully led directly to much worse damage being done.

But at a deeper level, each president could not initially admit to himself that he had done anything wrong. Richard Nixon rationalized the actions of his administration by arguing that Democratic presidents had done the same thing and that his enemies were out to destroy him. Ronald Reagan rationalized his trading of arms for hostages by arguing that the hostages were merely a side issue in a strategic opening to Iran. Bill Clinton rationalized his lies by arguing that his enemies were out to get him, other presidents had done worse, his private life was not the public's business, and that he was technically telling the truth. Each of these sets of rationalization allowed the presidents to choose the path that would end up damaging them more than an initial admission would have.

The Key Decisions

Each president made initial key decisions that reflected character flaws that got them in trouble.

When he first heard about the Watergate break-in, Richard Nixon did not hesitate; he followed his first instinct, which was to limit the political damage and cover up the incident. His decision was based in part on a rational calculation that publication of the incident would hurt him politically and might uncover other damaging evidence of illegal behavior by other White House and reelection committee aides.

Ronald Reagan's initial reaction when the McFarlane trip to Iran was made public was to deny that there was any problem. The actions of his highest aides were merely intended to bring about an opening to Iran. He knew he did not approve of trading arms for hostages, so he concluded that he could not have done so. After weeks of publicity and press reports and after strong prodding by David Abshire and George Shultz, he finally was convinced that he had to tell the truth. He saved himself from further damage from the diversion of funds to the Contras by fully cooperating with the investigations, refusing to invoke executive privilege, and turning over requested documents. He thus stemmed the damage to his presidency in a way that the other two presidents did not. While the diversion of funds was a grave constitutional issue, it was done without President Reagan's knowledge.

Bill Clinton's first instinct was to deny his sexual relationship with Monica Lewinsky, just as he had with all previous allegations of sexual impropriety. He did seem to consider the possibility of telling the truth after the allegations became public; but after a poll by Dick Morris, he concluded that confessing to lying would have hurt him too much politically; so he embarked upon the firm policy of denial that resulted in his impeachment.

Ironies

The initial irony is that each president was hurt more by the denial and cover-up than they would have been if they had immediately admitted the truth about their previous behavior. The cost would have been quite high for each, but the truth did come out in the end and caused more harm at that late stage than an early admission would have.

But the more profound irony is that none of the three breaches of trust by presidents or their aides was necessary or achieved the goals that had been hoped for.

Richard Nixon needed no illegal help to prevail in 1972. Even if the Democrats had nominated Edmund Muskie, arguably their strongest candidate (they nominated George McGovern instead), Nixon's policies were popular enough to ensure his reelection. Thus the actions that led to the cover-up were unnecessary; it was only Nixon's paranoia and the tone he set that encouraged his aides to undertake the actions that eventually brought him down.

Ronald Reagan's selling of arms to Iran did not free the hostages; those who were freed were replaced by others. The selling of inferior arms at inflated prices did not endear the United States to Iran. Iran also had its own security reasons for not wanting to be pulled into the Soviet orbit. The diversion of funds from Iran to the Contras did not make a big difference in their ability to resist the government of Nicaragua. Only a small percentage of the funds intended for the Contras actually got to them.

Bill Clinton did not need to lie in his deposition in the Paula Jones case. The judge dismissed the case several months later even though it had been revealed that Clinton had lied. Neither did he need to lie directly to the American people in his finger-pointing statement. As became evident after his lies were revealed, public support for him was strong enough to weather that storm. Clinton's highest public approval ratings came during his impeachment and trial. His treatment of Kenneth Starr as his nemesis became a self-fulfilling prophecy when Starr pursued Clinton and revealed his most private and embarrassing actions.

They Did It to Themselves

Each president felt that his political enemies and the press were the cause of his troubles, but in fact each of these presidents was the primary cause of his own problems. A character flaw was the fundamental cause of each of their self-inflicted wounds.

Richard Nixon had developed deep suspicions about his political enemies and the tactics they would use to get him. But these suspicions were often projections of the tactics he used to get his enemies. Certainly Nixon did have political enemies and they wanted to beat him politically, but that is the nature of politics. Nixon's overreaction and actions against his enemies were the very things that accomplished what his enemies never could have: his resignation from the presidency in disgrace. Nixon's epiphany came in the last moments of his presidency in his farewell remarks just before leaving Washington: "... always remember,

others may hate you, but those who hate you don't win unless you hate them, and then you destroy yourself."²⁸

Ronald Reagan felt that the press was guilty of embarrassing him and undermining his attempts to repair relations with Iran. He felt that Congress tried to obstruct his policies and was generally irresponsible. Certainly Congress had different policy preferences than Reagan and passed laws of which he did not approve. But it was not the press or Congress that initiated the doomed arms for hostages initiative, and it was not their fault that North and Poindexter felt justified in breaking the law. It was Ronald Reagan's decision to trade arms for hostages, and it was his approach to policy direction and managing his White House that allowed his subordinates to pursue their illegal actions.

Bill Clinton had long blamed his enemies for working to bring him down. He felt that the press was hostile to him, and his wife blamed a "vast right wing conspiracy" for attempting to orchestrate his downfall. Certainly, Clinton had political enemies who were doing their best to undermine him. But it was not his political enemies who initiated his affair with Monica Lewinsky or led him to lie about it. It was his own denial of his actions and refusal to take responsibility for his own behavior that caused his disaster.

Threats to the Constitution and the Polity

The central themes in each of these crises of the presidency were: the rule of law, accountability to the Constitution, and abuse of power. The major threat in Watergate was to the domestic political process, the integrity of elections, and the civil rights of citizens. The major threat in Iran-Contra was to the constitutional role of Congress, the obligation that the president take care to faithfully execute the laws, and accountability to the Constitution. The major threat in the Clinton case was the president's respect for the judicial process and his obligation to obey the law.

The Watergate activities constituted a major threat to civil liberties and the integrity of the political and electoral process. There was a secret unit paid by White House aides that was used to intimidate political enemies and illegally gather information which was unaccountable to anyone but its political directors. President Nixon used governmental agencies, such as the Treasury, FBI, and CIA for illegitimate and illegal activities. His campaign operatives illegitimately interfered with the political and electoral process.

In addition to his own lies and illegal actions, President Nixon set the tone so that his campaign and White House aides thought that he wanted them to undertake illegal and unethical activities in support of his reelection, which they did.

The Iran-Contra case presented a major threat to the rule of law and the constitutional balance between the president and Congress. Secretary of Defense Weinberger warned the president that the arms-for-hostages deal might violate the law and was unwise policy. The president's failure to notify Congress about the covert action was more troubling. But the most serious problem was the

diversion of funds to the Contras in direct violation of the law. The president's aides also destroyed evidence, produced false chronologies, and lied to Congress to hide their actions. William Casey intended to set up "The Enterprise" to generate money that could be spent at his direction entirely unaccountable to the Congress, the Constitution, or the law.

The threat to the Constitution was not merely the sidestepping of the legitimate role of Congress in making foreign policy in the violations of the Arms Export Control Act and the failure to notify Congress as required by the National Security Act. These violations of the law were serious, but probably did not rise to the level of "high crimes and misdemeanors." The diversion of funds to the Contras, however, violated the law and constituted a serious breach of the Constitution by allowing the executive to make policy unilaterally in contravention of the explicit will of Congress as expressed in public law signed by the president. If such practices were permitted, it might indeed lead to the tyranny of the executive that the Framers feared. If the president had known of and approved of the diversion of funds, it would likely have led to impeachment proceedings.

As it was, there was no evidence that President Reagan had any knowledge of the diversion of funds until it was discovered by the aides of the Attorney General. Thus, no impeachment actions were taken in Congress. President Reagan's actions in the aftermath of the public disclosures and his aides' strong urgings were clearly superior to the reactions of Presidents Nixon and Clinton to their crises. He ordered that the truth be found, and he cooperated with the investigation authorities.

On the other hand, despite the Independent Counsel's conclusion that "President Reagan's conduct fell well short of criminality which could be successfully prosecuted," he failed to carry out all of his duties as president.²⁹ The congressional committee that investigated the Iran-Contra affair concluded:

... the ultimate responsibility for the events in the Iran-Contra Affair must rest with the President. If the President did not know what his national Security Advisors were doing, he should have. . . . It was the president's policy—not an isolated decision by North or Poindexter—to sell arms secretly to Iran and to maintain the Contras "body and soul," The Boland Amendment notwithstanding. . . . The President created or at least tolerated an environment where those who did know of the diversion believed with certainty that they were carrying out the President's policies.³⁰

What President Reagan was guilty of was setting the tone in the White House that encouraged his most senior aides to believe that they were carrying out his wishes when they undertook to violate the law by giving aid to the Contras when it was against the law. With respect to selling arms to Iran, Reagan was willing to continue even after his secretaries of state and defense argued that it might be illegal.

The major issues raised by President Clinton's impeachment were not so much his personal behavior, which was deplorable, but his lying about it under oath in legal proceedings. His lies undermined the judicial system, which

depends on the truthful testimony of all, particularly government officials. His lies to the American people also undermined the trust of citizens in the president and the government more generally. President Clinton was also guilty of setting the tone in his White House where lying was acceptable, insofar as his aides and appointed officials also lied to the public in his defense, even though they probably realized privately that the president was lying. His lies and actions were corrupting.

Clinton's behavior was thus corrupting of several members of the executive branch, and he did not take care that the laws be faithfully executed. His actions were deplorable and wrong but did not constitute the same level of institutional threat to the polity that Watergate and Iran-Contra did.

ENDNOTES

1. An earlier version of this chapter was published in David Abshire, ed. *Triumphs and Tragedies of the Modern Presidency* (Westport, CT: Praeger, 2001).
2. In 1969, Nixon told John Ehrlichman to set up "a little group right here in the White House. Have them get off their tails and find out what's going on and figure out how to stop it." Quoted in Stanley I. Kutler, *The Wars of Watergate* (NY: Alfred A. Knopf, 1990), p. 112. On May 16, 1973, Nixon in a conversation with Alexander Haig said: "The Ellsberg thing was something that we set up. Let me tell you. I know what happened here and Al knows what happens. We set up in the White House a independent group under Bud Krogh to cover the problems of leaks involving, at the time, of the Goddamn Pentagon papers; right? . . . the plumbers' operation." Tape transcript in Stanley I. Kutler, *Abuse of Power: the New Nixon Tapes* (NY: The Free Press, 1997), p. 514.
3. Fred Emery, *Watergate* (NY: Times Books, 1994), p. 30.
4. See Stanley Kutler, *Abuse of Power* (NY: The Free Press, 1997), p. 33.
5. Of the Huston Plan, Nixon said: "Well, then to admit that we approved . . . illegal activities. That's the problem." Also, "I ordered that they use any means necessary, including illegal means, to accomplish this goal." Quoted in Kutler, *Abuse of Power*, p. xxi.
6. Leonard Garment, *Crazy Rhythm* (NY: Times Books, 1997), p. 297.
7. See Kutler, *Abuse of Power*, p. xxi.
8. The New York Times, *The White House Transcripts* (NY: Vintage Books, 1973), pp. 146–147; (March 21, 1973).
9. See Michael Genovese, *The Nixon Presidency* (NY: Greenwood Press, 1990), p. 190.
10. *The White House Transcripts*, quoted in Larry Berman, *The New American Presidency* (Boston: Houghton Mifflin, 1987), p. 189.
11. See Kutler, *The Wars of Watergate*, pp. 431–434.
12. George Shultz, *Turmoil and Triumph* (NY: Charles Scribner's and Sons, 1993), p. 824. After reviewing the CIA analysis, Shultz concluded: ". . . Khomeini was firmly in power, and Rafsanjani was carrying out the Ayatollah's resolute policy of opposition to the United States; recent events in Iran suggested that no Iranian leader other than Khomeini has the power to initiate a rapprochement with the United States or even to offer such a suggestion for debate."
13. Quoted in William S. Cohen and George J. Mitchell, *Men of Zeal* (NY: Viking, 1988), p. xx.
14. See George Shultz, *Turmoil and Triumph* (NY: Charles Scribner's Sons, 1993), pp. 237, 239, 785. Shultz was angered that he was told by White House aides that the U.S. was not selling arms to Iran and that he assured our European allies of it at the same time that the U.S. was in fact selling arms to Iran. See pp. 783–924, *passim*.
15. See the chronology in William S. Cohen and George J. Mitchell, *Men of Zeal* (NY: Viking, 1988), p. xix–xxxi.
16. See Shultz, *Turmoil and Triumph*, p. 811.

17. See Theodore Draper, *A Very Thin Line* (NY: Hill and Wang, 1991), pp. 225–226, 247–248. See also Bob Woodward, *Shadow* (NY: Simon and Schuster, 1999), p. 137. White House counsel Peter Wallison also reported to chief of staff Donald Regan that the shipments were likely violations of the Act. See Woodward, *Shadow*, p. 109.
18. See Schultz, *Turmoil and Triumph*, p. 804.
19. See the discussion of the law in Cohen and Mitchell, *Men of Zeal*, pp. 12–13; pp. 279–288.
20. For an analysis of the Boland Amendment and its application to the National Security Council staff, see *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Washington: Government Printing Office, November 1987), pp. 41–42.
21. See Draper, *A Very Thin Line*, p. 33.
22. Shultz, *Turmoil and Triumph*, p. 811.
23. *Report of the Congressional Committees Investigating the Iran-Contra Affair*, p. 280.
24. See David Abshire's account of his experience in the Reagan White House, *To Save a Presidency: The Curse of Iran-Contra* (NY: Oxford University Press, forthcoming). On the internal Baker investigation, see Bob Woodward, *Shadow* (NY: Simon and Schuster, 1999), p. 151. It included 13 interrogations of the president, a staff of 67 people in the White House, and examined more than 12,000 documents.
25. *Washington Post* (8 February 1998), p. A20.
26. Quoted in Jeffrey Toobin, "Circling the Wagons," *The New Yorker* (July 6, 1998), p. 29.
27. *Congressional Quarterly Weekly* (22 December 1998), p. 3324.
28. Richard Nixon, *RN: The Memoirs of Richard Nixon* (NY: Grosset and Dunlop, 1978), p. 1089.
29. Lawrence E. Walsh, *Iran-Contra: The Final Report* (NY: Random House, 1993), p. 445.
30. *Report of the Congressional Committees Investigating the Iran-Contra Affair* (November 1987), pp. 21–22.

Reading 40

“If Men Were Angels . . .”: Presidential Leadership and Accountability

THOMAS E. CRONIN AND MICHAEL A. GENOVESE

Novelist W. Somerset Maugham once said, “There are three rules for writing a novel. Unfortunately, no one knows what they are.” In the same vein, we are tempted to conclude that there are three rules to being an effective president, yet no one knows exactly what they are.

As we have discussed, the presidency changes from season to season, occupant to occupant, issue to issue. We may never unravel most of the paradoxes of the American presidency. Yet there are things the American people and presidents can do to encourage realistic and effective presidential performance.

We want to be led, yet we cherish our independence and freedom. We want a “take charge” leader in the White House, yet we demand accountable

and responsive leadership. Many Americans are now less content to hold presidents to account only every four years when they go to the polls, they insist on daily accountability. Our system is built on distrust of powerful leaders and the need for their accountability.

Compared with the heady days of FDR, and later the national security state of the Cold War era, the presidency of today is a more constrained office. If FDR invented the modern presidency during the depression and World War II, the demands of the Cold War further enlarged and empowered the office. But in this post-Cold War end of the century age, the demand for a strong, centralized presidency seems less pressing.

While we may on occasion need heroic leadership, we are less in need of presidential dominance than in the past 65 years. The end of the Cold War has liberated us from the need for deference to the powerful presidency model, which proved effective on occasion yet dangerous at other times. However, as the United States enters the 21st century, we are rightly still concerned with how best to keep presidents effective and honest.

HOLDING PRESIDENTS TO ACCOUNT

As our theme suggests, any discussion of presidential leadership and accountability must take into account the ever-present paradoxes of the presidency. Some part of us wants a larger-than-life, two-gun, charismatic Mount Rushmore leader. Harrison Ford in the film *Air Force One* (1997) vivified this yearning. Still, there is the remarkably enduring antigovernment, anti-leadership, chronic-complainer syndrome. We want strong, gutsy leadership to operate on alternate days with a "national city manager." We want presidents to have a wealth of power to solve our problems, yet not so much they can do lasting damage.

Accountability implies not only responsiveness to majority desires and answerability for actions but also taking the people and their views into account. It also implies a performance guided by integrity and character. Accountability implies as well that important decisions could be explained to the people to allow them to appraise how well a president is handling the responsibilities of the office.

To whom is accountability owed? No president, it would seem, can be more than partially accountable to the people, for each president will listen to some people and some points of view more than to others. If we have learned anything in recent years, however, it is that the doctrine of presidential infallibility has been rejected. Arbitrary rule by powerful executives has always been rejected here. But what should be done when there are sharp differences between experts or when expert opinion differs sharply from the preponderance of public opinion? How much accountability, and what kind, is desirable? Is it not possible that the quest for ultimate accountability will result in a presidency without the prerogatives and independent discretion necessary for creative leadership?

The modern presidency, in fact, may be unaccountable because it is too strong and independent in certain areas and too weak and dependent in others. One of the perplexing circumstances characterizing the modern presidency is that considerable restraints sometimes exist where restraints are least desirable and inadequate restraints are available where they are needed. Also, presidential strength is no guarantee that a president will be responsive or answerable. Indeed, significant independent strength may encourage low answerability when it suits a president's short-term personal power goals.

THE PRESIDENCY AND DEMOCRATIC THEORY

How do you grant yet control power? Can leaders be empowered yet also democratized?

These are classic questions our framers faced and they have been central to debates in democratic political theory. Leadership implies power; accountability implies limits. Contradictions aside, accountability is a fundamental piece of the democratic puzzle. In essence, it denotes that public officials are answerable for their actions. But to whom? Within what limits? Through what means?

There are essentially three types of accountability: *ultimate accountability* (which the United States has via the impeachment process); *periodic accountability* (provided for by general elections and occasional landmark Supreme Court decisions); and *daily accountability* (somewhat contained in the separation of powers).¹ James Madison believed elections provided the "primary check on government" and that the separation of powers ("ambition will be made to counteract ambition") plus "auxiliary precautions" should take care of the rest.²

There *are* times when presidents abuse power or behave corruptly. But even in the two notable bouts with presidential abuses, Watergate and the Iran-Contra scandal, the president was stopped by the countervailing forces of a free press, an independent Congress, an independent judiciary, and a (late to be sure) aroused public.

We may hold presidents accountable, but can they be held responsible? That is, can they muster enough power to govern? One means to improve accountability and also empower leadership is to strengthen the party system in America. Our parties are, at least by European standards, relatively weak, undisciplined, and non-ideological. A stronger party system could organize and mobilize citizens and government, diminish the fragmentation of the separation of powers, and mitigate against the atomization of our citizenry. If the parties were more disciplined and programmatic, the government's ability to push through its programs would doubtless be enhanced.

A more responsible party system would also ground presidents in a more consensus-oriented style of leadership, and thereby diminish the independent, unconnected brand of leadership so often attempted by recent presidents. A more robust party system can help join the president and Congress together in a more cooperative relationship.³

All presidents work to be successful, but what does it mean to be a success? Great popularity? A good historical reputation? Achieving your policy goals? A high congressional box score? Getting your way?

If success is measured merely by getting one's way, then many bullies would be judged successful. But success means more than getting what one wants. In determining success, we must always ask "power for what *ends*?" because power divorced from purpose is potentially dangerous and democratically undesirable.

Presidential politics should always be concerned with central issues and values. Candidates who run for the White House and thereby seek the power to influence the lives of millions of Americans ought to do so because they have a vision of building a better and more just America. If this is not the case, those candidates who are merely seeking power for its own sake should be smoked out in the election process.

If we look on government as the enemy and politics as a dirty word, our anger turns to apathy, and power (but not responsibility) slips through our hands. We often look at politics not as a means to achieve public good, but as an evil; we see elections as the choice between the lesser of two evils; we presume that our democratic responsibilities are satisfied merely by the act of voting every so often, or we drop out of politics. Consequently, many people abandon politics altogether.

That is why politics and elections matter so much. People who give up on politics in effect abdicate the possibility of implementing their most cherished policy ideas. People who give up on politics and parties are essentially giving others power over their lives.

In a democracy, a successful president pursues and uses power, not for selfish ends, not to aggrandize his or her own status, but to help solve problems and help citizens enjoy the blessings of freedom and opportunity.

The best of democratic leaders are teachers who both understand and educate all of us about the promise and mission of America. They move the government in pursuit of the consensus generated from the values of the nation. They appeal to the best in citizens and attempt to lead the nation towards its better self.⁴

Franklin Roosevelt suggested that the presidency "is preeminently a place of moral leadership."⁵ Thus, presidents may use their office as a "bully pulpit" to, when at their best, appeal to our better instincts and lead democratically. It was through politics and government that the progressive social movements of this century helped move us toward greater racial and gender equality, devised policies to expand education and opportunities to a wider segment of the population, and attempted to protect and expand the rights of citizens. These battles are far from over. As a nation we have a long way to go before we can truly grant the blessings of liberty and prosperity to all citizens, yet it is through politics—and only through politics—that we can hope to achieve these goals. And if we want our politics and our government to succeed, we must find ways for citizens to guide and encourage responsible presidential leadership.

Presidents may and have also used the powers of the presidency to promote economic stability and economic growth in America. The Roosevelts, Wilson, Kennedy, Reagan, and Clinton all strived to stimulate the economy and promoted favorable trade programs that in turn created jobs and economic security. Presidents generally know what is expected of them as promoters of economic development, yet, here again, they are likely to respond to the yearnings and lobbying of those who become actively engaged in the political process and party politics.

The ends power serves are important, but in presidential terms, virtue is not enough. A successful president must have *character* and *competence*. Character without competence (resources, skill, power) gives us noble but ineffective leaders; competence without character may lead to government by demagogues.

Presidents who lead in the democratic spirit can encourage leaders, foster citizen responsibility, and inspire others to assume leadership responsibilities in their communities. Democratic leaders establish a purposeful vision, pursue progressive goals, and question, challenge, engage, and educate citizens.

The United States needs a strong presidency and a democratically controlled presidency, and this in turn necessitates a strong civic culture.⁶ Political theorist Benjamin R. Barber notes the challenge inherent in such a quest:

At the heart of democratic theory lies a profound dilemma that has afflicted democratic practice at least since the eighteenth century. Democracy requires both effective leadership and vigorous citizenship; yet the conditions and consequences of leadership often seem to undermine civic vigor. Although it cries for both, democracy must customarily make do either with strong leadership or with strong citizens. For the most part, depending on devices of representation in large-scale societies, democracy in the West has settled for strong leaders and correspondingly weak citizens.⁷

The American presidency operates within a system of shared power, one in which the claims of many groups constantly compete. Presidential struggles with other governmental and extra-governmental centers of power stem from the larger societal conflicts over values and the allocation of wealth and opportunity. As a result, the presidency becomes a place in which few radical decisions are made; most of its domestic policies are exploratory, remedial, or experimental modifications of past practices.

Limitations on a president's freedom of action are, to be sure, often desirable. Many of the checks and balances that are still at work today were deliberately designed by the framers of the Constitution. In some measure, presidents should be the agents of their campaign commitments, their parties, and their announced programs. They should be responsive most of the time to the views of the majority of the American people. Presidential behavior should be informed by the Constitution, existing laws, and the generally understood, albeit hazier, values that define democratic procedure. The notion that party programs, spelled out in campaigns, allow the public some control over policy

through the election process is a valuable brake, one that needs, if anything, to be revitalized. Other brakes that limit presidential discretion may be viewed as positive or negative, depending on an individual's political and economic views. The constraining of a president by the bureaucracy and by special interests is implicitly, if not explicitly, a kind of accountability, even if it is not exactly the kind we want as our prime constitutional safeguard against the abuse of power.

The American political system is deliberately designed to enhance the chances of special interests to veto policies that affect them. Although the various economic and professional elites may not be as cohesive and omnipotent as the power-elite school suggests, the wealthier interest groups have perpetuated decidedly favorable governmental privileges to advance their business and professional goals. Although at times of crisis, there are substantial incentives for subordinating special claims to the nation's well-being, such times are a presidential luxury. Under normal conditions, an elaborate network of influences and obligations may frustrate presidential objectives, especially in the area of domestic policy.

A president's leeway for achievement can be determined by the degree to which consensus or conflict exists among elite interest groups within a particular arena of public policy. If the policy elite of a given profession or industry share wide agreement on a particular issue, it is very difficult for a president to effect an opposing point of view. Occasional exceptions such as Medicare, automobile safety devices, and antipollution legislation are not persuasive, because the profession or industry in question seldom lost much and the costs for such programs were in most cases passed on in some way to the consumer or taxpayer. If, however, cleavage or confusion occurs over substantive or procedural matters, a president has some independent influence; although even then, the scope and type of his influence will be shaped by the character of the conflict among these elite. Thus, Johnson's efforts to create model cities as demonstrations of how social and physical planning could produce decent and livable cities soon was heavily influenced by pressures from home builders, developers, real-estate associations, big-city mayors, and other strategically positioned interests. Likewise, despite widespread public support for rapid progress on the environmental front, Carter's environmental protection recommendations soon became influenced by the views of the automobile manufacturers as well as by the unions potentially affected by stringent standards and too rapid implementation. More recently, President Clinton's efforts at health care reform met with fierce opposition from insurance companies and medical care providers who felt threatened by the proposed reforms. They were able to mobilize the public and Congress and prevented Clinton's proposals from being enacted into law. Sometimes a consensus among policy elites may be the product of presidential commitment, but the reverse is more likely to be the case.

Prior commitments to special interests inhibit planning, brake a president's capacity to focus on new problems, and help to exhaust his political credit. Despite high expectations, presidents may find themselves merely a

strategically situated broker for their own party, able only in a limited way to affect existing patterns of grants or subsidies.

Every grant program generates concrete benefits to a particular group, and possessiveness characterizes nearly every group that has participated in the growth of federal aid programs since the New Deal. According to the doctrine of interest groups, the unorganized are left out of most policymaking equations. In fact, seldom does an interest group emerge that has as its aim the promotion of the public benefit, a program that would benefit everybody. At the same time, the standards to justice and respect for law deteriorate amid informal, frankly feudal negotiations among those stronger interests who can adjust the laws to their own advantage and profit.

In the end, all three branches of government and the bureaucracy listen more attentively and usually yield to the ideas from those segments of society able to represent themselves, able to shape the character of those branches, and able to supply precisely that information and argumentation needed to make the system move. So it is that the many well-heeled interests continue to enjoy a special advantage in any contest with a president who is a genuine progressive.

The founders would most certainly have been pleased to see how the system of checks and balances has thwarted executive tyranny. But they would have perhaps been less pleased with the gridlock that so often characterizes relations between the president and Congress.

"How," political scientist Bert Rockman asked in *The Leadership Question*, "can leadership be exerted yet restrained?"⁸ It is a question that confounded the founders and continues to trouble us today. Political gridlock is often the reality. Is the presidency broken? Does it need to be fixed? Would-be reformers must be cautious to ensure that reform would not deform.

Is the separation-of-powers model *the* problem? Does it create deadlock and paralysis? If you are the president, there must be times when it seems so. Woodrow Wilson, writing in 1884 long before occupying the White House, saw the separation as creating a massive political escape clause for blame and responsibility. Wrote Wilson:

Power and strict accountability for its use are the essential constituents of good government. . . . It is, therefore, manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake. . . . Were it possible to call together again the members of that wonderful Convention . . . they would be the first to admit that the only fruit of dividing power had been to make it irresponsible.⁹

Upon reflection, we are reminded of the positive benefit of separating, sharing, and overlapping power. If one values, as we do, deliberation, discussion, and debate; if we accept a model of democratic governing based on consensus and cooperation, then the reform agenda will be short. But some see the separation as the likely suspect in the crime of stalemate and gridlock.

ENDNOTES

1. Theodore C. Sorensen, *Watchmen in the Night* (Cambridge, Mass.: MIT Press, 1975).
2. James Madison, *The Federalist Papers*, No. 51. (Modern Library, 1937).
3. Sidney M. Milkis, *The President and the Parties* (New York: Oxford University Press, 1993).
4. Bruce Miroff, *Icons of Democracy* (New York: Basic Books, 1993), chap. 1.
5. James M. Burns, *Roosevelt: The Lion and the Fox* (San Diego: A Harvest/HJB Book, 1956, renewed 1984), p. 151.
6. Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984).
7. Benjamin R. Barber, "Neither Leaders Nor Followers: Citizenship under Strong Democracy," in Michael R. Beschloss and Thomas E. Cronin, eds., *Essays in Honor of James MacGregor Burns* (Englewood Cliffs, NJ: Prentice Hall, 1989), p. 117.
8. Bert Rockman, *The Leadership Question* (New York: Praeger, 1984), p. 221.
9. Quoted in Larry Berman, *The New American Presidency* (Boston: Little, Brown, 1987), p. 344.

Reading 41

Presidential Character and Judgment: Obama's Afghanistan and Health Care Decisions

STEPHEN J. WAYNE

Character matters. Presidents cannot escape being themselves. Their character shapes their beliefs and behaviors and conditions their relationships with others. It is not the only factor that affects their thinking, speaking, deciding, and interacting, but it is relatively constant and almost always relevant. Winning candidates do not discard their personalities when they enter the White House. Traits that they exhibited in the past affect their current behavior and anticipate their future thoughts and actions. That is why the study of presidential character and its derivatives, beliefs and style, are so important.

The growth in the power of the presidency, the reach of a president's decisions and actions, and the impact they can have all over the world make it essential to examine character and the ways in which it can and does influence policy making and implementation. The problem, however, is that the goals of contemporary political science research and its quantitative modes of analyses are not well suited for the examination of complex, and somewhat idiosyncratic, case studies, particularly those in which personality traits are inferred

from observable behavior and then used to explain particular outcomes and anticipate others that might occur in similar situations.

The presidential decisions and actions in which character is likely to play a larger role are those that tend to be the most important and controversial; they also tend to be the most complex with many interrelated variables potentially affecting the final decision. The character of the president, the external environment, the particular situation, and the timeframe for the decision must also be considered. It is difficult to identify all these variables, much less discern their individual and collective impact on decision making.

But political scientists want to do more than understand a single decision. They want to provide a broader explanation of how a president or presidents decide; they also would like to anticipate future decisions. To achieve this objective, they need to generalize. A single case study cannot be the basis for a generalization. Comparative case studies are necessary. To facilitate comparison, idiosyncratic details must be excluded. But when they are, the comparative cases may lack external validity if those factors, independently or collectively, affected the final outcome. External validity versus comparability is the trade-off social scientists must make when designing their research projects. The more detail they include, the more likely the case will reflect the real world, but also the more difficult it will be to generalize from one decision or action to another.

That said, however, ignoring the influence of character on judgment and performance because the discipline of political science finds it difficult to study flies in the face of conventional wisdom that people can and do affect the decisions they make and the actions they take. It also ignores a body of psychological literature that postulates theories of personality on the basis of clinical observation, experimental design, psychometric measurement, social interaction, organizational leadership, and environmental influences on individual and group behavior. Finally, it neglects a newer area of research in which genetic components of attitude formulation and political activity are being identified and measured.

Studies of character, however, have their research problems as well. One stems from the psychological inferences drawn from observable behavior. Such inferences, even those based on psychological theory, are inherently speculative. Another difficulty results from the specification of particular psychological facts on performance. If situational and environmental variables are not considered or are not constant, the outcome may be different even though the character of the person making the decision or taking the action has not changed. Character itself may also be variable although it tends to be more stable than most other factors. Nonetheless, the fluidity of variables can make conclusions case specific. A third problem pertains to the fallacy of reductionism, attributing the explanation to only psychological factors. In short, researchers have to be careful in drawing conclusions and using those conclusions to generate hypotheses for further testing.

In this article, I examine aspects of Barack Obama's character that have led to his political beliefs and policy decisions. My objective is to discern

how those beliefs and that operating style have affected his judgment to send 30,000 additional American military forces to Afghanistan and to proceed with comprehensive health care reform after Democrats lost their 60-seat majority in the Senate. In the next section, I discuss the relationship between character, beliefs, and operating style. I then examine the decisions themselves, noting Obama's prior statements and beliefs, public opinion during the period when he made his judgments, and the president's decision-making style. In my conclusion, I briefly discuss the similarities and differences in how Obama's character affected these two important judgments made during the first two years of his presidency.

WHAT IS CHARACTER?

James David Barber in his book, *Presidential Character*, defines character as a basic orientation toward life, how people view themselves (1972, 5). Character is based on self-awareness and unconscious feelings; it is developed from personal experience. That experience affects cognition, deliberation, and judgment. It also has something to do with the proclivity for sticking to judgments or changing them in the light of public disapproval, new evidence, or changing conditions.

Stanley Renshon views character as "the basic foundation upon which personality structures develop and operate" (1998, 184). He sees it as shaping the processing of information, the making of decisions, and actions that follow from those decisions.

The personal experience from which character is developed also affects beliefs. As people become aware of the world around them and seek to understand it, they formulate views that frame the mindset from which their judgments are made. Their views and beliefs also shape their perceptions of reality; they are guides to decision making.

Presidential candidates go to great lengths to articulate their beliefs and the systems that tie those beliefs together. In doing so, they create expectations about their future decisions and actions in office. Ronald Reagan and George W. Bush were guided by their conservative views throughout their presidencies. They knew what they believed, and, for the most part, did not question those beliefs or the assumptions on which they were based. Bill Clinton and Barack Obama were less certain and less ideological. They were also more open to competing observations and recommendations, more inquisitive, more deeply involved in the decision-making process, and more nuanced in their judgments. They seemed to be more confident of their ability to figure out complex problems than were Reagan or Bush but at times also seemed less decisive than their Republican predecessors.

Style, another derivative of character, is the way we go about doing things: how we interact with others and the manner in which we make, implement, and communicate judgments. A personal operating style is patterned behavior designed to project one's most desirable attributes and hide the least desirable ones. It is an instrument for protecting and enhancing a person's self-image.

According to Barber, political style is developed at the time of a person's first political success. The style worked to achieve a particular goal and will be used again until it no longer works or seems inappropriate. During the first 15 months of his presidency, Obama's penchant for delegating the details of his policy goals to Congress tarnished the leadership image he wished to project and the policy goals he sought to achieve. He soon found that to appear to be in charge, he had to take charge.

The challenge for presidents is to demonstrate the personal qualities that helped get them elected and, at the same time, be able to learn on the job and adjust their behavior accordingly. It is not easy. If presidents find that their beliefs need to be modified and their operating styles changed, they must do so in a way that does not undermine their credibility, sincerity, and strength of character.

Presidential advisors sometimes try to reshape a president's image, the new Richard M. Nixon and the old Nixon, for example. But they cannot change their president's personality, which is why the image game usually fails. Nor have presidents sought professional therapy as an antidote to their own travails or the unpopularity of their policies and actions.

The bottom line is that character, beliefs and behavior are relatively stable. They are the product of years of experience and development. They are in Barber's words, "what life has marked into a man's being" (Barber 1972, 8).

OBAMA'S AFGHANISTAN DECISION

Who would have predicted that a Democratic president, who had opposed the war in Iraq, including Bush's troop surge in 2006, whose partisan base had become increasingly antiwar, who had assembled a group of advisors who were initially divided over what to do and how to proceed, would expand a costly military operation twice in Afghanistan, a country with limited strategic importance to the United States, few exportable resources, and a weak, and by American standards, corrupt government? The answer is that anyone who studied Obama's public pronouncements before, during, and after the campaign, his determination to establish and maintain a strong leadership image, and his careful, comprehensive decision-making process would not have been surprised by his decision. They might have been surprised, however, that Obama, an advocate of participatory democracy, would disregard the opinions and emotions of his electoral supporters.

Beliefs and Policy Positions

Obama's statements before and during his presidency reiterate the need to engage the Taliban and al Qaeda successfully in Afghanistan:

October 2, 2002: "I don't oppose all wars. What I am opposed to is a dumb war. What I am opposed to is a rash war. You want a fight, President Bush? Let's finish the fight with Bin Laden and al Qaeda, through

effective, coordinated intelligence, and a shutting down of the financial networks that support terrorism, and a homeland security program that involves more than color-coded warnings.”¹

August 01, 2007: “We did not finish the job against al Qaeda in Afghanistan. We did not develop new capabilities to defeat a new enemy, or launch a comprehensive strategy to dry up the terrorists’ base of support. We did not reaffirm our basic values, or secure our homeland. It is time to turn the page. When I am President, we will wage the war that has to be won, with a comprehensive strategy . . . getting out of Iraq and on to the right battlefield in Afghanistan and Pakistan.”

July 15, 2008: “As President, I will pursue a tough, smart and principled national security strategy—one that recognizes that we have interests not just in Baghdad, but in Kandahar and Karachi, . . . I will focus this strategy on . . . ending the war in Iraq responsibly; [and] finishing the fight against al Qaeda and the Taliban.”

October 22, 2008: “It’s time to heed the call from General McKiernan and others for more troops. That’s why I’d send at least two or three additional combat brigades to Afghanistan. We also need more training for Afghan Security forces, more non-military assistance to help Afghans develop alternatives to poppy farming, more safeguards to prevent corruption, and a new effort to crack down on cross-border terrorism. Only a comprehensive strategy that prioritizes Afghanistan and the fight against al Qaeda will succeed, and that’s the change I’ll bring to the White House.”

February 17, 2009: “The Taliban is resurgent in Afghanistan, and al Qaeda supports the insurgency and threatens America from its safe-haven along the Pakistani border. To meet urgent security needs, I approved a request from Secretary Gates to deploy a Marine Expeditionary Brigade later this spring and an Army Stryker Brigade and the enabling forces necessary to support them later this summer.”

Public Opinion

The American people were divided over the best course of action to take in Afghanistan. They did not think the U.S. military action was a mistake (Gallup Poll 2010a), but were split on the merits of General Stanley McChrystal’s request for 40,000 additional troops. Prior to the president’s decision on whether to commit more U.S. forces, less than half the populace indicated that they favored increasing the number. The president’s partisan base was far less supportive than Republicans and independents. Only 17% of Democrats approved the 40,000 troop increase compared to 36% of independents and 65% of Republicans (Newport 2009).

With his party opposed, Americans divided, the country still in the midst of a deep economic recession, and the government having spent \$1.5 trillion bailing out too-big-to-fail companies and stabilizing and stimulating the economy, why would Obama, in office for less than a year, agree to a

policy that would cost billions, perhaps trillions more,² increase the potential for greater U.S. casualties, and stretch the military even further for a longer period without ostensible increases in the terrorist threat level in the United States?

Part of the answer to that question has to do with Obama's long-standing belief that Afghanistan harbored a great threat to the U.S. security than did Iraq. Part also has to do with his extended decision-making process and the consensus he generated among his national security advisors.³

Decision-Making Style

Obama is a believer in the deliberative process. In *The Audacity of Hope*, he wrote that decisions made in such a manner are better substantively and politically (Obama 2006, 92–96). The collective manner in which such judgments are reached builds support for them, not only within the advisory group but also outside of it.

Obama is also a person who strives for consensus. His style is to assemble policy experts; hear them out; encourage debate; ask detailed, substantive questions; and move the discussion toward a resolution. Although he likes “to keep the process crisp,” (Zeleny and Rutenberg 2008), he does not rush to make a final judgment.⁴

The strategic meetings on Afghanistan began in late September 2009 and continued through early December of that year. There were 10 sessions that lasted a total of 25 hours. They were contentious and at first, somewhat discursive. Vice President Biden, Chief of Staff Emanuel, and several of the president's campaign advisors who were appointed to top national security positions in the administration expressed concern about expanding the war, fearing another quagmire like Vietnam or Iraq. Their views mirrored the concerns of many Democratic partisans. Taking a more aggressive military stand were Secretary of Defense Gates and Secretary of State Clinton and the military commanders who believed that additional troops were necessary to conduct a successful counterinsurgency operation. Although leery of expanding U.S. involvement in Afghanistan, the president also ruled out withdrawal. He had previously approved a request for 17,000 new forces to be sent to Afghanistan within the first month of his presidency to which he added 4,000 trainers a few weeks later. Now the commanders were requesting thousands more, and they were doing so in a way that seemed to force the president's hand.

The report of General Stanley McChrystal, the person designated by the Pentagon to replace the previous commanding officer in Afghanistan, General David McKiernan, had been intentionally leaked to Bob Woodward of the *Washington Post*. The White House assumed the leakage was designed to pressure the president to add the 40,000 additional troops that McChrystal said he needed to meet the strategic goal of defeating the Taliban. Obama was peeved. He believed the military was “really cooking the thing in the direction they wanted”⁵ (Woodward 2010, 280, 195).

In his book, *Obama's Wars*, Bob Woodward chronicled the discussions at the meetings and the diverse perspectives that drove them. The president was an active participant. "I was more involved in the process than it was probably typical," Obama told Woodward (2010, 279). Peter Baker of the *New York Times* reported, "Mr. Obama peppered advisers with questions and showed an insatiable demand for information, taxing analysts who prepared three dozen intelligence reports for him and Pentagon staff members who churned out thousands of pages of documents" (Baker 2009).

But the president also realized that his options were quite limited. The deteriorating situation on the ground indicated that more human and material resources were necessary to reverse the gains the Taliban had made after U.S. and coalition forces had removed them from power and turned their military priorities to Iraq.

Obama had another objective. He wanted to demonstrate that he was commander in chief in theory and practice. He believed that his predecessor had been too deferential to the military (Alter 2010, 379). Lacking military experience, Obama knew he was dependent on people who had it, but he did not want them to take advantage of him. He felt that he needed to push back.

In the end, the president accepted the recommendation for 40,000 additional troops, but he set limits: the United States would send 30,000 with the rest to be requested from America's coalition partners in North Atlantic Treaty Organization (NATO); the strategy was to be more narrowly defined. Instead of the broad goal of defeating the Taliban, Obama redefined it to degrading them and convincing some of their leaders to join or support the Afghan government.⁶ An exit strategy was put into place which anticipated a reduction of American forces beginning July 2011, if conditions on the ground merited. Finally the president ordered a reassessment of the war and U.S. military operations in it in a year's time, December 2010. Woodward reports that the president personally spelled out these strategic objectives in a six-page, single-spaced order (2010, 315).

The final step in the decision-making process was to secure the support of every one that was involved in the formulation and would be involved in the execution of the plan. Obama told the group, "If you have any personal misgivings or any professional doubts about what we're going to do, tell me now because I need to hear it. If you don't think this is the right approach, say so now" (Woodward 2010, 326). But he also quickly limited the military options by adding, "The only alternative is just to go with trainers," 10,000 to 11,000 troops, an option that the military viewed as the most risky and the least likely to be successful (Woodward 2010, 326).

The value Obama placed on achieving a consensus explains why he made sure that each of the participants agreed to his final strategic judgment before he announced it publically in a televised address at West Point on December 1, 2009. In the words of one of his advisors, "It was his assessment that everyone could and should get behind it" (Kornblut, Wilson, and De Young 2009). The president wanted to protect himself from further military criticism, interpretation, and additional requests for troops. He was drawing a line in the sand.

The new strategy was consistent with Obama's previous statements on the war. Although not driven by public opinion, it was also not inconsistent with that opinion. Nonetheless, Obama still had to convince antiwar Democrats that his policy made sense, was appropriate, but also sufficiently limited. Polls taken in the aftermath of the president's decision indicated that a majority of Democrats and Republicans supported the new policy. And they continued to do so over the next several months.⁷

Finally, the decision was the product of a style Obama preferred: initially expansive, increasingly structured, with the end being a consensus among his policy advisors. It reflected his pragmatic, nonideological perspective and his penchant for deciding with his head, not his heart or gut. The emotion, if any, was conveyed in the president's presentation at West Point and during his earlier visit to Dover Air Force base to view the return of the remains of the fallen. He had flown back to Washington in the early morning hours without saying a word (Woodward 2010, 255–56).

In short, Obama's Afghanistan decision was in character. It coincided with his beliefs and his operating style. It was a rational judgment and his to make. Congress's role was minimal. But it also showed his tenacity, his refusal to be hurried or bullied, his political muscle, and his need to reassert his authority when he perceived it being challenged by others.

Factors, other than character, such as the intelligence he received, past and current U.S. policy commitments, the president's declining job approval ratings, and the substance of the policy debate itself also could have affected his judgment. Although the decision might not have been predictable, given the opposition of Obama's base of electoral support, the president's personal attributes, prior beliefs, the need to take charge, and the desire for consensus help explain it.

THE DECISION TO PURSUE HEALTH CARE REFORM IN JANUARY 2010

Health care had been a major priority for Obama even before he launched his presidential campaign. But at two critical points in his pursuit of this objective as president, major hurdles threatened to derail this goal: the first was the severe economic downturn and the huge amount spent by the government to stabilize and stimulate it, and the second was the Democrats' loss of their 60 vote, filibuster-proof Senate majority in the special election in Massachusetts in January 2010. Either of these hurdles could have been sufficient to induce the pragmatic Obama to modify, delay, or abandon his health care reform initiative. But he chose to pursue it despite unified Republican opposition; angry protests by conservative activists; and a much-divided American public, the majority of whom did not view health care as a crisis, who were skeptical of large-scale government programs and growing budget deficits.

Trust in government was also declining. According to Gallup polling data, distrust of government reached its highest point in 1993 and 2010 when national

health care reform was being considered. Only 19% believed that they could trust “the government in Washington to do what was right just about always or most of the time” (Gallup Poll 2010c).

With the House and Senate enacting different bills, with each institution leery of the other's policy formulation, with the political climate becoming less hospital to the Democrats' and Obama's job approval ratings declining to under 50%, why would the president pursue such an initiative and risk further erosion of his political capital and leadership image?

This case study answers that question by looking at how Obama's character and political goals combined to shape his decision to maintain course, increase his behind-the-scenes activities, and ultimately achieve passage of the legislation.

Beliefs and Public Positions

Obama believes that government must help those who are unable to help themselves, those who have few other options. In *The Audacity of Hope*, he wrote, “I am angry about policies that consistently favor the wealthy and powerful over average Americans, and insist that government has an important role in opening up opportunity to all” (Obama 2006, 10). He also argued that health care was a right, not a privilege—hence the government's obligation to extend that right to all its citizens.⁸

Obama's quest for health care reform began in the Illinois state legislature and continued in the U.S. Senate. He promised health care reform in no uncertain terms during his presidential campaign. It remained a top priority of his administration during his first year in office.⁹ Although his emphasis on the role of government as a force for equal opportunity lessened, and his talk of a government option for those without insurance faded, Obama continued to advocate health care reform and used increasingly populist language to do so. He spoke of the clash between the special interests of the insurance industry and the public's interest, the high costs of premiums, and lapses in coverage to make his point. Deficit reduction also became a principal argument after the Congressional Budget Office indicated the amount of savings that the various House and Senate plans would produce. Throughout the debate, the president reiterated his targets of expanding coverage, reducing costs, and limiting the discretion of insurers to exclude people based on preexisting conditions. Obama's statements show a shift in emphasis but not change in his goal or resolve.

January 25, 2007: “On this January morning of two thousand and seven, more than sixty years after President Truman first issued the call for national health insurance, we find ourselves in the midst of an historic moment on health care. The federal government should be leading the way here.”

January 21, 2008: “The problem is not that folks are trying to avoid getting health care; the problem is they can't afford it. My plan emphasizes

lowering costs. setting up a government plan so that people who don't have health insurance can buy into it and will get subsidized" (Congressional Black Caucus 2008).

August 28, 2008: "My core belief is that people desperately want coverage, and my plan provides those same subsidies. If they are provided those subsidies and they have good, quality health care that's available, then they will purchase it. Now is the time to finally keep the promise of affordable, accessible health care for every single American."

July 14, 2009: "For decades, Washington failed to act as health care costs continued to rise, crushing businesses and families and placing an unsustainable burden on governments. But today, key committees in the House of Representatives have engaged in unprecedented cooperation to produce a health care reform proposal that will lower costs, provide better care for patients, and ensure fair treatment of consumers by the insurance industry."

September 9, 2010: "The problem that plagues the health care system is not just a problem for the uninsured. Those who do have insurance have never had less security and stability than they do today. More and more Americans worry that if you move, lose your job, or change your job, you'll lose your health insurance too. More and more Americans pay their premiums, only to discover that their insurance company has dropped their coverage when they get sick, or won't pay the full cost of care."

December 24, 2009: "If passed, this will be the most important piece of social policy since the Social Security Act in the 1930s, and the most important reform of our health care system since Medicare passed in the 1960s. And what makes it so important is not just its cost savings or its deficit reductions. It's the impact reform will have on Americans who no longer have to go without a checkup or prescriptions that they need because they can't afford them; on families who no longer have to worry that a single illness will send them into financial ruin; and on businesses that will no longer face exorbitant insurance rates that hamper their competitiveness."

March 22, 2010: "Today's vote answers the prayers of every American who has hoped deeply for something to be done about a health care system that works for insurance companies, but not for ordinary people. If you have health insurance, this reform just gave you more control by reining in the worst excesses and abuses of the insurance industry with some of the toughest consumer protections this country has ever known—so that you are actually getting what you pay for."

March 25, 2010: "Three years ago, I came here to this campus [University of Iowa] to make a promise. Just a few months into our campaign, . . . I promised that by the end of my first term in office, I would sign legislation to reform our health insurance system. On Tuesday, after a year of debate, a century of trying, after so many of you shared your stories and your headaches and your hopes, that promise was finally fulfilled."

Public Opinion

The president lost control of the health care debate in June 2009 when angry protests at town meetings commanded national news media attention. Accusations of government interference in individual and family matters were fueled by the “tea party” movement, a loose coalition of people unhappy with large, expensive, and invasive government programs. During this period, the president was unable to maintain his focus on health care because of a host of other issues at home and abroad that required his attention. Moreover, the long drawn out, public negotiations among members of Congress, even within the Democratic majority, evidenced disagreement rather than consensus, tarnished the president's leadership image, and reduced the level of public support for the various legislative proposals that Congress was considering.

Support for policy change had given way to skepticism. When President Obama took office, 64% believed it to be a government responsibility to make sure that all Americans had health care while 33% did not (Gallup Poll 2010b). By the time of the health care vote in March of 2010, the percent in favor of a government obligation slipped to 50% with 47% opposed (Gallup Poll 2010b). The week before the House voted to accept the Senate bill and then enacted modifications through the reconciliation process, slightly more people opposed the Obama plan (48%) than supported it (45%; Jones 2010); right after the vote approving the legislation, the percentage thinking that the bill was a good thing increased to 49% while 40% thought it a bad thing (Saad 2010a). One week later, however, the public reaction was slightly more negative than positive and has remained so through the 2010 midterm elections (Newport 2010). In short, public opinion remained divided with slightly more people opposed to the administration's efforts than in favor of them.

Opinions also continued to be highly polarized with 81% of Democrats favoring the legislation, 86% of Republicans opposing it, with independents more negative, 54%, than positive, 43% (Saad 2010b). In general, those who lacked coverage, younger and poorer segments of the society, were more supportive than people that had private insurance or were covered by Medicare. With the exception of his base, Obama obviously was not responding to a ground swell of public support.

The Democrats obviously believed that no action would have been more detrimental than some action even if overall support was tepid at best. This judgment was undoubtedly conditioned by their experience in 1994 after the Clinton health care proposal died in Congress, and the Democrats subsequently lost control of both houses of Congress. The Obama administration also made the case that once health care had been enacted, people would benefit from the legislation and become more supportive of the reform as a result. Republicans, influenced by their base's intense opposition, believed that either way, if the legislation passed or if it did not, the Democrats would lose. And they did in the 2010 midterm elections.

Decision-Making Style

On the evening of January 19, 2010, before the actual results of the Massachusetts election were reported by the news media, President Obama met with House Speaker Nancy Pelosi and Senate Majority Leader Harry Reid at the White House. The topic was health care or more precisely, how to achieve the House-Senate compromises necessary to enact the legislation in the light of the political defeats the Democrats had suffered in the gubernatorial elections of 2009 and the Massachusetts' Senate defeat in January 2010.

Pelosi and Reid had built majorities in their respective chambers and passed health care bills. However, the differences between the two bills were substantial. The president was frustrated. Not only had his legislative strategy not produced his desired outcome, but Democrats were questioning his leadership, specifically his failure to take charge and exercise sufficient legislative influence to get a bill enacted. In retrospect, the White House had come to believe that Obama had delegated too much to Congress; now his chief of staff was recommending that he reopen debate and salvage what he could from the health care package that each house enacted. The president was determined not to give up when he had gotten so close. He had told his Cabinet earlier in January during the football playoffs that he was on the two-yard line and did not want to settle for a field goal (Cohn 2010, 14).

Obama was scheduled to attend a televised House Republican caucus in Baltimore at the end of January. By most accounts, the president did well debating his opponents, so well in fact that he scheduled a televised, bipartisan White House Health Care Summit a month later to keep the initiative alive, much to the dismay of congressional Democrats who had seen little success in the president's previous bipartisan efforts.

The White House event (held at the Blair House across the street from the White House) lasted seven hours and attracted considerable media attention. Although the president accepted about 20 GOP suggestions at the meeting, he won no Republican converts. But he was energized, nonetheless. A proposed rate hike of almost 40% by Anthem Blue Cross of California also gave Obama a concrete illustration to use when explaining why the status quo in health care was unacceptable.

Stimulated by his own rhetoric and by polls showing some shift in public sentiment in Obama's direction, the president, congressional leaders, and lobbyists representing groups that favored the legislation—labor unions, the pharmaceutical industry, the AARP, and Moveon.Org—began to work Capitol Hill. They identified reluctant and on-the-fence Democrats, mounted a \$6 million advertising campaign directed at these representatives' electoral constituencies, and organized an outreach effort with the help of Governing America, an organization his campaign directors established to help him mobilize public support for his policy priorities. Prominent individuals within the constituencies of these representatives were contacted and asked to call their members of Congress and urge them to support the legislation (Zeleny 2010).

The president met or spoke with 64 members of the House in the month following the White House Summit. To Blue Dog Democrats, he stressed the savings that the Congressional Budget Office said the legislation would produce;

to the liberals, he warned of the political fallout that a health care defeat would reap on their other policy priorities as well as their party's electoral fate in the 2010 midterms (Stolberg, Zeleny, and Hulse 2010).

During this campaign, Obama's most important convert was Dennis Kucinich (D-Ohio), a liberal activist unhappy with the absence of a government option in the Senate plan. On a flight on Air Force I from Washington, DC, to Cleveland, OH, Obama convinced him to support the legislation. Kucinich's backing led other liberals to join the health care bandwagon. Momentum was shifting among Democrats to vote for the Senate bill and then modify it by using the reconciliation process in which only a simple Senate majority would be required for enactment. There was little Republicans could do but cry foul and threaten retaliation at the polls, a threat that the president tried to mollify by his public campaign to give Democrats political cover and by his promise to help them in the forthcoming congressional elections.

Obama, his cohorts, and Speaker Pelosi snatched victory from defeat. The president had gotten personally involved, albeit late in the game. Several of his personal traits fueled that involvement.

Obama tries hardest when he personalizes issues. He did so with health care by using the stories of everyday Americans to bring the issue home to himself, congressional Democrats, and the general public. A very analytic and rational man, Obama sometimes allows his intellect and nonemotive temperament to get in the way of the emotional appeal of his message with the result that people often have difficulty identifying with him and his policy pronouncements. Obama is aware of his "philosopher-king" tendencies and tries to compensate for them by staying in touch. He holds town meetings in which he listens to the personal travails of others and regularly reads a representative sample of the mail he receives, chosen by his communication aides.

He uses stories from these accounts to illustrate and amplify his message. But some of them also have an impact on him, penetrating his stoic temperament. On January 8, 2010, Obama read a letter from Jennifer Cline, a young woman from Michigan who had voted for him, gotten pregnant, lost her job, and subsequently developed melanoma and basal cell skin cancer. Her story, which she wrote in a three-page letter, moved Obama. It touched an emotional cord within him and heightened his resolve. He wrote back to her (Saslow 2010).

David Axelrod tells a similar story. After indicating to the president in the summer of 2009 that enactment of health care reform was looking more and more dubious, Axelrod said that Obama turned to him, patted him on the shoulder, and replied that he had met a woman in Wisconsin whose ovarian cancer was not covered by her health insurance. "So you know what? We've got to keep on fighting" (Axelrod 2010).

Obama also personalized the issue. He remembered the difficulties that his mother had in getting her insurance company to pay for her cancer treatments. Pushed to the brink, he fights back.¹⁰ There is a toughness about him, a steeliness that is masked by his conciliatory attitude, cool temperament, easy manner, and polished style, but the toughness is there nonetheless, hardened by the experience of Chicago politics.¹¹

Obama prefers carrots to sticks, which is the reason that he was willing to negotiate the details of policy to gain his objective. He seeks common ground. But thus far, the priorities themselves have been nonnegotiable, a point he re-emphasized with his belated lobbying on health care.

Obama is a messenger who believes in his message. He loves to go public and seems to get a high from it. He seems exhilarated by the crowds he draws, feels “cleansed” by his interaction with everyday folks (Obama 2006, 102), and glorifies in the virtue of his appeal (Obama 2006, 8–9). After losing control of the health care debate in the summer of 2009, he regained it with the Health Care Summit in late February 2010 and maintained it through the enactment of the legislation on March 30, 2010. During that period, he made 11 speeches on health care in addition to his occasional remarks and briefings by his press representatives (White House 2010).

Not only did his belated public campaign begin to reframe the issue successfully within the public arena and energize the Democratic base, but it also got him going. Obama raised the political stakes for himself and House Democrats, thereby making defeat that much more unacceptable. In other words, he challenged himself and, by so doing, finally demonstrated the leadership skills that had been promised but were not evident to most members of Congress and the American people. He seemed to be responding to something inside of himself.

It may have been the personal stories he heard or read, the urgency with which he reiterated the health care appeal publicly and privately, or the political stakes that threatened to undermine his influence and jeopardize his and his party’s other legislative policy priorities. It may have been the criticism he received from fellow Democrats in Congress for not providing more direction and resolve; his own beliefs when he finally was able to focus on health care to the exclusion of other problems; or the end of the first year when he started evaluating his presidency, his powers, and, though early, his legacy. But somehow, the issue became personal for Obama, and that made him work harder to achieve it. He went the extra mile and was successful.

CONCLUSION

We have examined two different cases in which character mattered, but it mattered in different ways. In the Afghanistan decision, it was Obama’s way of deliberating, thinking, and striving for consensus that shaped the policy judgments he made, although his need to assert his authority as commander in chief was also evident. In health care, it was his refusal to give up, his determination to succeed because it meant so much to him personally and politically that resulted in the enactment of the legislation.

In both cases, Obama’s previous positions, statements, and addresses were generally consistent with the policy outcome with the possible exception of the absence of a government health care option, a proposal he made and emphasized during the campaign but downplayed once he saw growing public and Senate opposition to this provision.

Surprisingly, public opinion did not seem to have a discernible effect on either decision, although the president obviously was aware of Democrats' concerns about Afghanistan and Republicans' dissatisfaction with his health care initiative. Public opinion was important to the president, not to follow but to lead.¹² The president needed to activate his base, particularly in districts held by Democratic representatives. He needed to provide cover to Democrats who represented more conservative constituencies and pressure for those who represented liberal ones but were unhappy with the compromises in the Senate bill.

Obama's failure to control the public debate must have been very disappointing to a candidate who had mobilized millions of volunteers, contributors, and voters, a president with considerable rhetorical skills who uses the bully pulpit so frequently, and an advocate of participatory democracy. That failure also gives rise to a special paradox for Obama—the travails of a leader within a democratic society. It gives credence to the charge of elitism that plagued him during his campaign and now in office.

The cases illustrate two personality dimensions of the man, the thoughtful, careful, rational decision maker who deliberates with experts and uses his intellectual skills to arrive a consensus and then acts on it; and the other, the passionate proponent of transformational change, redistributive politics, and activist government. Both Obamas were elected, and at different periods, both seem to be governing.

ENDNOTES

1. Unless otherwise noted, all Obama's speeches and remarks quoted in this article and given before he became president can be found by date on the following Web site: <http://www.asksam.com/ebooks/releases.asp?file=Obama-Speeches.ask>. Speeches and remarks after he became president can be found by date on the White House Web site: <http://www.whitehouse.gov>.
2. The Office of Management and Budget estimated to the president during October 2010 that 40,000 additional troops along with those already there and reconstruction efforts could cost \$1 trillion a year from 2010 to 2020. Peter Baker of the *New York Times* wrote that the president "seemed in sticker shock" when he read the report (2009).
3. The president's national security team included Vice President Joseph Biden, Secretary of State Hillary Clinton, Secretary of Defense Robert Gates, the president's National Security Advisor James Jones and his deputies, Special Consultant on Afghanistan and Iraq Richard Holbrook, American Ambassador to Afghanistan Karl Eikenberry, White House Chief of Staff Rahm Emanuel, and the nation's top military commanders: Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, General David Petraeus, head of Central Command, and General Stanley McChrystal, commander of U.S. forces in Afghanistan. Eikenberry and McChrystal participated from Afghanistan via secure conference call.
4. In the first year of the Obama administration, major policy-making sessions generally exceeded the amount of time originally set aside for them, for which Obama usually apologized (King and Weisman 2009).
5. The McChrystal report contained three troop-level options, adding 10,000–11,000, 40,000, or 85,000 more. The smallest number would be used primarily for training Afghan security forces. The larger numbers would also be able to protect the population and engage the enemy. The first option would be insufficient to achieve the objective of defeating the Taliban; the third one was unrealistic, given the political environment at home and the military effort still under way in Iraq (Woodward 2010, 213). Obama was miffed at his Hobson's choice.
6. The redefined goal was also designed to reflect the relatively short period during which the president believed he would have public support for his decision. Obama thought he would have support for only two years, no more (Woodward 2010, 110).

7. A CBS News poll conducted March 29–April 1, 2010, found 49% approving the president's handling of the situation in Afghanistan, 34% disapproving, and 17% unsure (http://www.pollingreport.com/obama_ad.htm). Americans remained supportive during the summer of 2010 according to the Gallup Poll. "Topics A-Z: Afghanistan" (2010a).
8. In a 2006 interview in the *American Prospect*, Obama said:

My values are deeply rooted in the progressive tradition, the values of equal opportunity, civil rights, fighting for working families, a foreign policy that is mindful of human rights, a strong belief in civil liberties, wanting to be a good steward for the environment, a sense that the government has an important role to play, that opportunity is open to all people and that the powerful don't trample on the less powerful. (Enda 2006).
9. Obama had told Tom Daschle, a few days after he took the oath of office, that he was determined to pursue major health care reform. "This [health care reform] is more important to me today than ever been before. It will stay that way" (Alter 2010, 115).
10. He attributes this lesson to his stepfather. In *Dreams from My Father*, he writes, "The first thing to remember is how to protect yourself," his stepfather told the young Obama after Barack returned home with an "egg-sized lump" on his head from a confrontation with another boy. The next day his stepfather bought boxing gloves, and taught him how to box" (Obama 1995, 35).
11. When Illinois state legislator, Alice Palmer, whose seat he was seeking in 1996 asked him to step aside after she was defeated in the Democratic primary for Congress, he refused to do so and went so far as to challenge the signatures on her petition to get back on the ballot, a challenge that was successful. When the Rev. Jeremiah Wright defended what Obama described as incendiary remarks at a speech at the National Press Club, Obama repudiated the reverend and cut his ties with a man he considered a personal and family friend who had presided over his marriage to Michelle, baptized him and his children, and with whom he had socialized on occasions. When Obama realized that his pledge to accept government funding for the general election if the Republican nominee did the same would be to his disadvantage, he opted out of his promise.
12. Lawrence R. Jacobs and Robert Y. Shapiro (2000) describe a similar reaction by President Clinton and his aides to the health care debate in 1993–1994.

REFERENCES

- Alter, Jonathan. 2010. *The Promise*. New York: Simon & Schuster.
- Axelrod, David. 2010. "Transcript from the Charlie Rose Show," March 23, www.charlieroose.com.
- Baker, Peter. 2009. "How Obama Came to Plan for 'Surge' in Afghanistan." *New York Times*, December 6, www.nytimes.com/2009/12/06/world/asia/06reconstruct.html.
- Barber, James David. 1972. *The Presidential Character*. Englewood, NJ: Prentice Hall.
- Enda, Jodi. 2006. "Great Expectations." *American Prospect*, January 16, www.prospect.org/cs/articles?article=great_expectations.
- Gallup Poll. 2010a. "Topics from A-Z: Afghanistan." <http://www.gallup.com/poll/116233/Afghanistan.aspx>.
- . 2010b. "Topics from A-Z: Health Care," <http://www.gallup.com/poll/4708/Healthcare-System.aspx>.
- . 2010c. "Topics from A-Z: Trust in Government," <http://www.gallup.com/poll/5392/Trust-Government.aspx>.
- Jacobs, Lawrence R., and Robert Y. Shapiro. 2000. *Politicians Don't Pander: Political Manipulation and the Loss of Democratic Responsiveness*. Chicago: University of Chicago Press.
- Jones, Jeffrey. 2010. "In the U.S., 45% Favor, 48% Oppose Obama Healthcare Plan." Gallup Poll, March 9, <http://www.gallup.com/poll/126521/Favor-Oppose-Obama-Healthcare-Plan.aspx>.
- King, Neil Jr., and Jonathan Weisman. 2009. "A President as Micromanager: How Much Detail Is Enough?" *Wall Street Journal*, August 12, online.wsj.com/article/SB125003045380123953.html.
- Kornblut, Anne, Scott Wilson, and Karen DeYoung. 2009. "Obama Pressed for Faster Surge," *Washington Post*, December 5, www.washingtonpost.com/wp-dyn/content/article/2009/12/05/AR2009120501376.html?hpid=topnews.

- Newport, Frank. 2009. "In U.S., Support for Increasing Troops in Afghanistan," Gallup Poll, November 25, <http://www.gallup.com/poll/124490/In-U.S.-More-Support-Increasing-Troops-Afghanistan.aspx>.
- . 2010. "U.S. Still Split on Whether Gov't Should Ensure Healthcare," Gallup Poll, November 18.
- Obama, Barack. 1995. *Dreams from My Father*. New York: Three Rivers Press.
- . 2006. *The Audacity of Hope*. New York: Crown Publishers.
- Renshon, Stanley A. 1998. *The Psychological Assessment of Presidential Candidates*. New York: Routledge.
- Saad, Lydia. 2010a. "By Slim Margins, Americans Support Healthcare Bill's Passage." Gallup Poll, March 23, <http://www.gallup.com/poll/126929/Slim-Margin-Americans-Support-Healthcare-Bill-Passage.aspx>.
- . 2010b. "One Week Later, Americans Divided on Healthcare." Gallup Poll, March 29, <http://www.gallup.com/poll/127025/One-Week-Later-Americans-Divided-Healthcare.aspx>.
- Saslow, Eli. 2010. "For a Look outside Presidential Bubble, Obama Reads 10 Personal Letters Each Day," *Washington Post*, March 31, www.washingtonpost.com/wp-dyn/content/article/2010/03/30/AR2010033004260.html.
- Stolberg, Sheryl Gay, Jeff Zeleny, and Carl Hulse. 2010. "Health Vote Caps a Journey Back From the Brink." *New York Times*, March 20, www.nytimes.com/2010/03/21/health/policy/21reconstruct.html.
- Woodward, Bob. 2010. *Obama's Wars*. New York: Simon & Schuster.
- Zeleny, Jeff. 2010. "Millions Spent to Sway Democrats on Health Care," *New York Times*, March 14, www.nytimes.com/2010/03/15/health/policy/15health.html.
- Zeleny, Jeff, and Jim Rutenberg. 2008. "A Delegator, Obama Picks when to Take Reins." *New York Times*, June 16, www.nytimes.com/2008/06/16/us/politics/16manage.html.

Reading 42

A New Imperial Presidency?

ANDREW RUDALEVIGE

How Much Power Should They Have?" demanded the cover of *Newsweek* as 2006 began, with President George W. Bush and Vice President Dick Cheney glaring out from underneath the headline. The question was prompted by a flurry of holiday season revelations centered on aggressive claims to, and use of, unilateral presidential powers. These ranged from the detention (and treatment) of imprisoned terror suspects around the world to phone taps placed on Americans without a court warrant. "We've been able to restore the legitimate authority of the presidency," the Vice President insisted; others worried that the Constitution's checks were being unbalanced, and that the "imperial presidency" of the Vietnam/Watergate era had risen from the grave.¹

FRAMING QUESTIONS

However timely, *Newsweek's* query was of course hardly new. Indeed, little at the Constitutional Convention of 1787 provoked more debate than the shape and scope of the executive branch. Delegates had to determine how the president would be selected, how long he should serve, whether he should be able to run for office more than once, how much power he should have—even whether the president would be a “he” or a “they.”² Some of the Framers were unconvinced of the need for an executive branch in the first place. Others thought that executive power must be strictly divided, to impede future tyranny: For them, in Virginia governor Edmund Randolph’s phrase, a single executive was “the foetus of monarchy.”³ And monarchy, of course, was what the Framers wanted to avoid.

In the end, the framework of presidential power was left largely in outline form, to be worked out in practice. This began with the very first sentence of Article II: “The executive power shall be vested in a President of the United States of America.” What is “the executive power”? What might it allow the president to do? About this, the document is silent.⁴ Otherwise, the president was given a limited array of specified powers, many of them further truncated by a sort of Congressional asterisk—the president can finalize treaties, or appointments, only with Senate approval; the execution of the law assumes its legislative passage; no money can be spent that is not first appropriated by Congress. How these shared powers might work was itself not clarified: the expectation was, in Madison’s famous phrase from the *Federalist*, that interbranch interaction would allow institutional “ambition . . . to counteract ambition.”

This began immediately, when Treasury Secretary Alexander Hamilton and Congressman James Madison argued over the scope of President Washington’s unilateral authority. Reduced to its essence, the dispute was—and is—relatively straightforward: Is a president limited to the specific powers affirmatively listed in the Constitution or granted in statute, or can he take whatever actions he deems in the public interest so long as those actions are not actually prohibited by the Constitution? Theodore Roosevelt’s iteration of Hamilton’s position put it clearly: “My belief was that it was not only [the President’s] right but his duty to do anything that the needs of the Nation required unless such action was forbidden by the Constitution or by the laws.” Roosevelt’s successor, William Howard Taft, clarified the opposing view. “The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied within such express grant as proper and necessary to its exercise,” Taft wrote. “There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . .”⁵

Whatever the Framers’ true intent, the Hamiltonian position won out over time. The growth in the size and scope of government during and after the Great Depression, and national security apparatus built during World War II and the Cold War effectively settled the argument. H. L. Mencken noted in 1926 that, “No man would want to be President of the United States in strict

accordance with the Constitution.”⁶ But people do want to be president, for the powers of the modern presidency go beyond anything the framers foresaw. By the time Franklin Roosevelt’s “modern presidency” was institutionalized by his successors, presidents had acquired many tools to work around their constitutionally mandated weakness. They used their formal powers strategically and pro-actively; they built an executive branch in their own image, with an extensive presidential staff to oversee and control it; and they continually and creatively interpreted Constitutional vagueness in their favor to reshape the policy landscape, relying on a direct connection with the public to legitimize their actions. Arguably a new framework for American government had been created along the way.⁷

Given the demands facing the nation, few were concerned about this development. Into the 1960s, indeed, most scholars were far more worried about a Congress seemingly unwilling or unable to meet the challenges of the postwar era: the president was largely seen as a “savior.”⁸ Legislators’ failure to prepare for World War II; their reluctance to commit to an expanded American role in the wider world after 1945; their slow deliberations in a nuclear age that required dispatch; their fragmented, seniority-dominated committee system that brought dullards to power; their tacit (and often not so tacit) defense of institutionalized racism; their short-sighted, sectional demands for local pork at the expense of wider public goods—looking at all this, many felt that leadership must be vested instead in the executive branch. If, as legal scholar Edward Corwin summed up long before Watergate, “the history of the presidency has been a history of aggrandizement,” that aggrandizement was generally well-received.⁹

Yet presidents soon plunged precipitately through the circles of paradise—from “savior” to “Satan”¹⁰—as Vietnam and Watergate showed the dark side of presidential unilateralism. Arthur M. Schlesinger, Jr.’s iconic 1973 book, *The Imperial Presidency*, argued that recent presidents, especially Richard Nixon, had sought not presidential strength but supremacy. He focused mostly on the war powers and “the rise of presidential war” independent of congressional authorization. However, he also criticized the efforts of the Nixon administration to centralize budgeting powers and unilaterally shape policy outcomes via impoundment (the refusal to spend appropriated funds), to build up a large, politicized staff, to greatly expand the “secrecy system,” and, relatedly, to broaden the notion of executive privilege. The Watergate era’s indictment against the presidency began with petty campaign sabotage and quickly ratcheted up to burglary, bribery, extortion, fraud, destruction of evidence, domestic espionage, obstruction of justice, and abuse of various aspects of executive power—from efforts to inflict punitive tax audits on political opponents, to widespread impoundments (the refusal to spend money appropriated by Congress), to covert action and even secret warfare.¹¹

The romantic glow of Kennedy’s “Camelot” thus dispersed in the harsh glare of Vietnamese rice paddies and judiciary hearing rooms. If presidents before Nixon showed imperial ambition, it was under his administration that overreach led to the empire’s fall; and in August 1974, faced with certain impeachment

and removal from office, he became the first and only president to resign from office. “When the President does it, that means that it is not illegal,” Nixon famously remarked.¹² But Congress, having battled Nixon the president, was now ready to turn its attention to the institution of the presidency. It was ready, in short, to *make* it illegal.

THE RESURGENCE AND DECLINE OF CONGRESS

Congress did so in extensive fashion. In *The Decline and Resurgence of Congress*, James L. Sundquist documents that, after a “Congress at nadir,” post-Watergate legislators achieved “a collective resolve . . . to restore the balance between the executive and legislative branches. . . . A period of resurgence had begun.”¹³ Throughout the 1970s, legislators erected a latticework of new laws aimed at reshaping executive-legislative relationships in the substantive areas in which congressional prerogative had been slighted. Not surprisingly, the framers of this resurgence regime foresaw a much greater role for Congressional input—for both advice, and consent—than recent presidents had desired or allowed. “The President has overstepped the authority of his office in the actions he has taken,” warned Representative Gillis Long (D-LA). “Our message to the President is that he is risking retaliation for his power grabs, that support for the counter-offensive is found in the whole range of congressional membership—old members and new, liberal and conservative, Democratic and Republican.”¹⁴ Congress intended to reclaim control over the nation’s bottom line and forbid presidential impoundments; to have a key role in authorizing and overseeing America’s military deployments and covert adventures; and to keep a close eye on executive corruption.

A partial list of enactments gives a sense of the scope of that ambition. For example, the Congressional Budget and Impoundment Control Act of 1974 prohibited unilateral presidential spending decisions and created important centralizing structures (the Budget Committees, the Congressional Budget Office [CBO]) to guide the legislative budget process. In foreign policy, the War Powers Resolution was to ensure that Congress had a say in the use of American force and the Hughes-Ryan amendment and Intelligence Oversight Act to keep it informed of covert operations. The Non-Detention Act and National Emergencies Act, as well as the Foreign Intelligence Surveillance Act (FISA) and the 1972 *Keith* decision, limited presidents’ internal security powers at home. The executive branch’s workings were to be made more transparent through an expanded Freedom of Information Act, various “government in the sunshine” laws, and the timely release of presidential documents; at the same time, the Supreme Court ruled in *U.S. v. Nixon* that the president’s power to assert “executive privilege” was not absolute, and was reviewable by the courts. The role of money in politics was to be diminished by a new Federal Election Commission; and should all this fail, investigations of executive malfeasance would be conducted under a new independent counsel operation.

Already by 1976, journalists were keeping track of “the score since Watergate” in a running battle of “the President versus Congress”; and Congress

was ahead. Indeed, President Gerald Ford would soon complain that “We have not an imperial presidency but an imperiled presidency. Under today’s rules . . . the presidency does not operate effectively . . . That is harmful to our overall national interests.”¹⁵

But it soon became clear that the resurgence regime was itself built on fragile foundations. Even in the decade following Nixon’s resignation, the office of the presidency retained a solid base of authority grounded in its ability to grab the public spotlight and set the agenda; the commander-in-chief power; its potential control over policy implementation; its role in appointments; and its veto leverage. Presidents, beginning with Ronald Reagan, aggressively used executive tools—from regulatory review to signing statements—to enhance their influence over bureaucratic outputs and avoid legislative direction. They resisted probes for information and asserted executive privilege, albeit usually by less inflammatory names, over a wide range of records while shielding even historical material from public release. Through appointing personal loyalists to executive positions across the bureaucracy, sometimes by recess appointment, they sought to “implant their DNA throughout the government.”¹⁶

The statutory side of the regime also crumbled. In some cases, efforts to specify the limits of presidential powers gave life in law to powers earlier exercised only informally; for example, the International Emergency Economic Powers Act, designed to limit presidents’ powers to impose economic sanctions, led to the declaration of dozens of “national emergencies” since 1979. In other cases, Congress itself backed away from using the processes it had created to challenge the president, or failed to make them work. Most dramatically, the War Powers Resolution failed to rein in presidents’ use of force, as deployments in Lebanon, Iran, Grenada, the Persian Gulf (in 1987–88), Libya, Panama, Somalia, Iraq (in 1993 and throughout the “no-fly zone” period), Haiti, Bosnia, Sudan, Afghanistan (in 1998), and Kosovo suggest. For example, though the NATO War in Kosovo utilized some 800 U.S. aircraft flying more than 20,000 air sorties at nearly 2,000 targets throughout Yugoslavia, President Clinton did not deem that troops had, in the language of the WPR, been “introduced into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances.”¹⁷ By the WPR’s 25th anniversary, even observers sympathetic to its intent argued it should be repealed.¹⁸

The Congressional Budget Act, likewise, failed to bring discipline to federal spending; after a brief blip into surplus in the late 1990s, by fiscal 2006, the federal government was more than \$400 billion in the red. As importantly, the deliberative process laid out in 1974 was often honored in the breach: though 13 budget bills were required to be passed by October 1 each year, in the four fiscal years 2002 through 2005, a *total* of six such bills were passed on time. As early as 2002, outgoing CBO director Dan Crippen summed up the situation bluntly: “The Congressional budget process is dead.” The beneficiary, he argued, was the president, for “without this kind of process . . . the Congress is going to be dominated by any President.”¹⁹

To be sure, not every piece of the regime crumbled at once, or for all time. Most obviously, Clinton's impeachment and trial in 1998–99 was the first since 1868 and the first ever of an elected president. Still, while it seems strange to talk about congressional deference in that context, even this period highlighted the potential powers of the president and renewed legislative acquiescence to their use. As Clinton himself suggested after the Democrats lost Congress in 1994, "I think now we have a better balance of both using the Presidency as a bully pulpit and the President's power of the Presidency to *do* things, actually accomplish things, and . . . not permitting the presidency to be defined only by relations with the Congress"—as witnessed by the 1998 headline "Clinton Perfects the Art of Go-Alone Governing." That summer, cruise missiles were fired at the Sudan and Afghanistan at the president's order even as the House debated his fate. Clinton's success in achieving his preferred policy outcomes in this period by taking advantage of the Congressional budget process and his veto power is also notable. Even the very process of impeachment—in the face of hostile public opinion—helped to discredit it, and to encourage the expiration of the independent counsel statute in 1999.²⁰ If the 1970s seemed delayed affirmation of Bob Dylan's famous observation that "the times, they are a-changin'," the state of the presidency by 2001 seemed better described by the satirical observation of Dylan's fictional film alter-ego, Bob Roberts: "The times they are a-changin'—back." The "imperial" infrastructure seemed largely rebuilt.

PREROGATIVE UNLEASHED: THE WORLD AFTER SEPTEMBER 11

Still, it is George W. Bush's presidency that provides the clearest—because most openly claimed and aggressively argued—case study of presidential unilateralism in the post-Watergate era. "I have an obligation to make sure that the Presidency remains robust. I'm not going to let Congress erode the power of the executive branch," Bush noted in 2002. The vice president—who got started in political life as a staffer in the Nixon White House—put the aim even more bluntly: "For the 35 years that I've been in this town, there's been a constant, steady erosion of the prerogatives and the powers of the president of the United States, and I don't want to be a part of that."²¹

In some areas, that attitude was translated to action even before September 11. Operating under the "theology," as one close observer put it, "that we the people have made the White House too open and too accountable," the Bush administration cracked down on Freedom of Information Act releases and increased federal executives' ability to withhold information from public view. The Presidential Record Act was amended by executive order to expand past administrations' capacity to delay or bar the opening of historical records. The administration later went to court, successfully, to defend its ability to withhold—even without formally claiming executive privilege—documents from congressional auditors or others seeking information about the energy task force headed by Vice President Cheney.²²

The brutal attacks on New York and Washington did, however, bring a tidal wave of renewed visibility and leverage to the presidential office. President Bush's standing to lead soared, and he seized the role—and the reins. On a variety of fronts, legislators hastened to expand his authority. With just one dissenting vote in either chamber—most Senate discussion of the bill actually took place *after* the vote—Congress passed a resolution on September 14, 2001, stating that “the president has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States” and granting him the power to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”²³ In the fall of 2002, Congress passed another broad delegation of authority to use force against Iraq. On the domestic front, the USA PATRIOT Act (Public Law 107–56), passed rapidly by Congress in October 2001, was designed to enhance the executive branch's prosecutorial tools and power to conduct criminal investigations by relaxing limits on surveillance and softening the barrier between domestic law enforcement and foreign intelligence gathering. Overall, Bush received historically high levels of legislative support throughout his first term. As 2006 began, he had yet to veto a single bill, this five-year streak the longest since Thomas Jefferson's administration. When asked at a press conference about it, the president sounded bemused: “how could you veto . . . if the Congress has done what you've asked them to do?”²⁴

Yet more often the president preferred to do, rather than ask. (“This administration,” groused Representative David Obey [D-WI], “thinks that Article I of the Constitution was a fundamental mistake.”)²⁵ Its interpretation of the commander-in-chief power was perhaps broadest and most controversial. For example, in late 2001 President Bush issued a secret executive order authorizing the National Security Agency (NSA) to track communications between individuals abroad with suspected terrorist connections and Americans within the United States. On its face, this action seemed to violate FISA, which had been passed in 1978 to regulate the process by which such intelligence was gathered, after a series of surveillance abuses by the FBI, CIA, and NSA were revealed in the mid-1970s. Under the act, surveillance required a warrant from a special court. When the targets were not Americans, obtaining a warrant required only that the Justice Department establish that they were working for a foreign power; for Americans, however, there had to be probable cause that the suspect was working on behalf of a foreign power in ways that might violate criminal statutes. FISA did allow for warrantless wiretapping for 15 days after a declaration of war, and for emergency taps of up to 72 hours (increased from 24 hours after September 11) before a warrant needed to be obtained.

When the initiative was revealed in late 2005, the administration quickly dubbed it the “Terrorist Surveillance Program” and argued that the president

had both inherent and statutory power to order such wiretaps. “My legal authority is derived from the Constitution, as well as the [September 2001] authorization of force by the United States Congress,” President Bush told a news conference.²⁶ A 42-page white paper defending the NSA program, delivered to Congress by the Justice Department in January 2006, argued that “the NSA activities are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.” Further, far from violating the law (i.e., FISA), the president was following its letter: The September 14, 2001, congressional resolution authorizing military force should be read as direct statutory approval for the program, because wiretapping was a “fundamental incident” of warfare similar to the detention of “enemy combatants” approved by the Supreme Court in the 2004 *Hamdi* case (see following). In any case, neither FISA nor Congress generally could limit the president’s “core exercise of Commander in Chief control”; any attempt to do so was simply unconstitutional.²⁷

This disquisition highlighted several important touchstones for presidential power. The notion that the president is “sole organ” of the nation for foreign policy dates to the 1936 Supreme Court case *U.S. v. Curtiss-Wright*, which argued for “plenary and exclusive” presidential power in international affairs. The idea that the executive power is indivisible (that, for example, the commander-in-chief power is separable from Congress’s overlapping powers to declare war and to provide for the regulation of armed forces and hostilities)²⁸ stems from a parallel theory of the “unitary executive.” That interpretation of Article II’s vesting clause implies that not only can Congress not infringe on presidential power but that only the president can set the boundaries of that power. In the white paper, for instance, the leading constitutional authority is often not the Supreme Court but the Justice Department’s Office of Legal Counsel. The brief stressed the “reasonable basis” underlying the surveillance decisions—and rather less plausibly, that this standard was equivalent to the “probable cause” required for a FISA warrant—but again, that determination was to be made entirely within the executive branch. Claiming the need for secrecy, the administration also declined to reveal to non-executive actors why it thought the FISA process was inadequate to defend national security.²⁹

Following a similar unilateral logic was the administration’s treatment of prisoners captured during various anti-terror operations and the Iraq war. Some were kept at so-called “black sites” run secretly by the CIA around the world. Hundreds more were imprisoned at the custom-built detention center at the U.S. naval base in Guantánamo Bay, Cuba. They were designated by the administration not as prisoners-of-war but rather as “unlawful enemy combatants,” without the rights POW status confers. This decision was arrived at not by hearing (for which the Geneva Conventions did provide) but by dictate: “pursuant to my authority as Commander in Chief and Chief Executive of the United States,” the president declared in February 2002, “I . . . determine that

none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . .” He added that “our values as a Nation . . . call for us to treat detainees humanely” and “consistent with the principles of Geneva.” In practice, though, in Secretary of Defense Donald Rumsfeld’s translation, those detained “would be treated in ‘a manner that is *reasonably* consistent’ with the Conventions—for the most part.” What the other parts might mandate was not then disclosed. However, with Rumsfeld’s approval, previous army regulations constraining interrogation methods were superseded. The secretary had already approved a highly secret program aimed at carrying out “instant interrogations—using force if necessary” around the world. As one intelligence official told reporter Seymour Hersh, the rules were to “grab whom you must, do what you want.” That might include sexual humiliation, thought to be particularly effective in shaming Arab subjects to cooperate, and the use of attack dogs.³⁰ These techniques were widely transferred to other military facilities in Afghanistan and Iraq, beyond the program’s original intent and often in tragically embellished form. The most notorious example was at the Abu Ghraib prison outside Baghdad in 2004, where repellent came to light. Charges that detainees’ human rights had been violated continued to be an issue into late 2005 as the “black sites” and the practice of “rendition”—sending prisoners to countries less encumbered by due process than the United States—came to light. The president repeatedly insisted that “we do not torture,” but a list of approved techniques for interrogation included such measures as hooding, sleep deprivation, the use of painful bound positions, and “water-boarding,” meant to simulate drowning. By 2005, CIA personnel had been implicated in the deaths of at least four prisoners in agency custody.³¹

The president claimed that even American citizens, arrested within the United States, could be held indefinitely without charge or lawyer if they too were labeled “enemy combatants.” The determination of who qualified as an enemy combatant was, according to the president, entirely up to him, not the courts or legislature, and not even reviewable by those branches of government.³² The president also asserted the authority to create military tribunals outside the normal judicial system for terrorism suspects and issued an executive order doing just that. Indeed, as with the NSA program, the executive powers flowing from the September 11 attacks and September 14 resolution were deemed to be practically unlimited. “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield,” the Justice Department declared.

Further, the term “torture,” Justice argued, was legally limited to acts sufficient to cause, for example, “organ failure . . . or even death,” and then only if inflicting such pain (and not, say, gaining information) was the “precise objective” of the interrogator. In late 2004, the administration broadened this definition somewhat (though continuing to argue that any previously approved techniques were not torture). In any case, as a memo constructed by a working group of administration attorneys concluded, “in order to respect the President’s inherent constitutional authority to manage a military campaign,

18 U.S.C. § 2340A [the prohibition against torture] as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.” Congress could not encroach on the exercise of that authority. Thus, when legislators overwhelmingly approved a blanket ban on torture as an amendment to a defense measure in late 2005, the president said he would prohibit torture (presumably as defined by the administration). But he also quietly noted that he would implement the provision “in a manner consistent with the constitutional authority of the President to oversee the unitary executive branch and as Commander in Chief.”³³ That is, he would decide how (and, arguably, when) to apply the ban. The vehicle was itself notable: this sort of “signing statement” was used more by George W. Bush than by all his predecessors combined, fencing off not only the commander-in-chief power but requirements that Congress receive information or that appointees have certain qualifications.³⁴ Again, the message was that the president would determine the limits of his power and of the law itself.

John Locke, in his *Second Treatise* of 1690, defines “prerogative,” as the power of the executive “to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it.” The executive needed discretion to implement the law or to set a policy course when law was lacking.³⁵ President Bush’s efforts, building on those of his predecessors, amounted to the extensive broad practical application of this notion. The legalistic, even formulaic, nature of the language used in asserting these executive claims tended to conceal their extraordinarily broad affirmations of presidential power. But there should be no mistake: These claims effectively placed the president above the law, at least where national security is concerned. In so doing, they recast the interbranch balance of power and did so without broad deliberation or debate.

Yet even Locke’s version of prerogative had some crucial natural limits. It was only legitimate as it reflected the public commonwealth, and could only be temporary: executive control in the absence of legislative direction stood only until “the Legislature can be conveniently assembled to provide for it.” Laws can be amended; but in a government under the law, they cannot be long ignored.

AMBITION OR AVOIDANCE? THE INVISIBLE CONGRESS

In that very American context the constraints on prerogative are even stronger. While presidents’ arguments have been distinctly unitarian, the Constitution is in turn devoutly trinitarian. Presidents, naturally, cherish the *Curtiss-Wright* language; but it is far from clear that the framers intended to give the executive—or any other branch—exclusive power over much of anything. In that context, “organ” is the right word only if by it is meant an instrument whose notes are defined by the full range of pressure on its keys. One cannot have an imperial presidency without an invisible Congress.

However, despite its own clear claims to the constitutional ground presidents seek to barricade, Congress has not acted effectively to protect its own authority. As President Bush's claims regarding the September 14 resolution's relationship to the NSA program make clear, broad delegations of power can be used in ways legislators may not have anticipated.³⁶ Did legislators mean to allow for warrantless surveillance within the U.S., bypassing FISA's requirements? Former Senate majority leader Tom Daschle (D-SD) said not: The topic, he wrote, "never came up . . . [T]he 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance." The resolution did "not authorize the President to do anything other than use force," Senator Dianne Feinstein (D-CA) added.

However, the president was right to note the breadth of the delegation of power at least implied by the resolution. And Congress did not act, at least immediately, to clarify its intent.³⁷

Such inaction was particularly notable because the September 14 resolution had already been interpreted once by the Supreme Court as encompassing a delegation of power not overtly specified. The case involved Yaser Hamdi, an American citizen captured on the Afghan battlefield and designated by the president as an "enemy combatant." As a result, he was detained in a military brig for some two and a half years without charge. The courts did reject the administration's claim that Hamdi's detention could not even receive judicial consideration ("The court may not second-guess the military's enemy combatant determination," the Justice Department told the Fourth Circuit Court of Appeals.). Further, the Supreme Court held that enemy combatants did require some sort of fair hearing. "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," Justice Sandra Day O'Connor's lead opinion declared. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

This famous sound bite obscured important parts of the court's overall finding. For instance, the court did not specify what due process might entail, leaving that for the administration to determine in the absence of legislative action. And, crucially, it upheld the administration's basic claim: that the September 14 resolution (termed the "authorization to use military force," or AUMF) constituted affirmative legislative delegation to the president sufficient to name enemy combatants. While the AUMF did not discuss such a procedure, the court found that the 1971 Non-Detention Act did not apply to Hamdi's case: taking prisoners was deemed so central to armed conflict that "it is of no moment that the AUMF does not use specific language of detention." As a result, in the parallel case of another American citizen, José Padilla—arrested not on a foreign battlefield but at Chicago's O'Hare airport—a circuit court panel found that "the AUMF as interpreted by the Supreme Court in *Hamdi* authorizes the President's detention of Padilla as an enemy combatant" as well.³⁸ The *Hamdi*

ruling was thus trumpeted in the administration's defense of the NSA program, which argued that wiretapping was similarly integral to warfare.

Did Congress mean to authorize presidents to name and detain American citizens as enemy combatants? As with the NSA, the case was far from clear—even the court was deeply divided, with O'Connor's opinion joined by only three other justices. But the courts are unlikely to rescue Congress from self-inflicted vagaries in statutory language. As Justice Lewis Powell once noted, "If the Congress chooses not to confront the President, it is not our task to do so."³⁹ Indeed, one dissent in *Hamdi* emphasized "the need for a clearly expressed congressional resolution of the competing claims." This was slow to emerge, however. In late 2005, the anti-torture language noted previously was passed, along with requirements that Congress be given reports on military tribunal procedures, ensuring judicial review of the tribunals' decisions by the Washington, DC, circuit court, and also limiting detainees' access to other American courts or for other claims. According to co-sponsor Carl Levin (D-MI), this was not intended to affect ongoing cases.⁴⁰ But affirmative language to that effect was not included; and the administration quickly sought to take advantage of that imprecision. The Justice Department moved to dismiss all pending cases brought by detainees, including the *Hamdan* case on the constitutionality of military tribunals awaiting Supreme Court action.

Ambition Rising? Still, that legislators had acted at all did suggest the stirrings of legislative resurgence. In fits and starts, in fact, Congress had begun to grow restive as early as 2004, when that year's election seemed to heat up the frozen ambition of the other branches of government. Bush's Democratic opponent, Senator John Kerry, fiercely criticized many of the administration's claims and policies, touting his own military service and challenging President Bush's leadership even on national security issues. The Supreme Court's 2004 decisions on the detention regime did at least serve notice of judicial concern regarding executive overreach. Further, as bad news from Iraq undercut the president's claim to a "mission accomplished," legislators began to question the administration's pre-war claims and post-invasion occupation plan. Defense department personnel testifying on behalf of additional appropriations for Iraq in 2004 were assailed for the request's lack of specificity, for the imprecision of prior spending estimates, and for the Abu Ghraib scandal. "This is a blank check," said Senator John McCain (R-AZ), and it seemed that blank checks were less fashionable than before.⁴¹

After a pause following President Bush's narrow reelection victory in November and inspiring Iraqi elections in late January, such criticism escalated dramatically by the fall of 2005. Abroad, continuing violence in Iraq, leading to casualties both military (U.S. troop deaths passed 2,150 in 2005, with another 15,000 wounded) and civilian (in December 2005, the president estimated the Iraqi death toll from the war at some 30,000), drove support for the war below 40 percent in many polls. Widespread negative assessments of the Iraq occupation's planning and administration did not help the public's outlook.⁴² At home, the anemic response to Hurricane Katrina shook public confidence in the government's ability to react to large-scale emergencies. The

president was also criticized for having appointed underqualified political loyalists to crucial management posts (Michael Brown, the Federal Emergency Management Agency director, was forced to resign after Katrina); he had to withdraw a nominee to the Supreme Court, White House counsel Harriet Miers, when she faced similar attacks. And in October 2005, the vice president's chief of staff, Lewis Libby, was indicted on perjury charges related to the leak of a CIA operative's name to the press after the operative's husband questioned the administration's rationale for the Iraq war.

The controversy surrounding torture, rendition, domestic eavesdropping, and the like added fuel to the furor on Capitol Hill. Democrats used the hearings on the nomination of Judge Samuel Alito to the Supreme Court to score the Bush administration's claims concerning executive power; even some Republicans (especially those worried about midterm elections in 2006, or themselves considering presidential bids in 2008) began to express doubts. The Patriot Act, due to expire at the end of 2005, was given only a brief extension until February 2006 when several Republican senators worried about its potential for intrusiveness and abuse joined with Senate Democrats to prevent a vote on a conference committee report that made most of the act permanent. McCain pushed anti-torture language into law; Judiciary chair Arlen Specter (R-PA) convened hearings into the legality of the NSA program. Even the reliable Fourth Circuit Court of Appeals blasted the administration's decision to charge José Padilla in the civilian courts, on charges never mentioned during his detention as an enemy combatant, in order (the court suggested) to avoid possible reversal by the Supreme Court.⁴³

In some ways the galvanizing effect of events, elections, court decisions, and legislative hearings came as no surprise. Political contexts had changed; the world had changed; but the Constitution, and the hold it gave each branch on each of the others, had not changed. It remained up to Congress to use its power and to do its job. Specter suggested that if Congress was not yet showing "muscle," at least it "is showing some tendons."⁴⁴

Still, any obituary for presidential power was at best premature. The contemporary executive retained the tools to define the terms of debate and utilize the office's structural advantages. The fact that Congress is a divided body run by collective choices gives presidents inherent advantages of (in Alexander Hamilton's terms) "decision, activity, secrecy, and dispatch." Even if they don't get the last say, presidents often get to make the first move—which itself may shape the landscape over which subsequent decisions are taken. In late 2005, President Bush sought to do just this. Seeking to re-frame opinion on Iraq, the president began an extensive schedule of speaking engagements defending his policy in Iraq, claiming steady progress and suggesting that calls for a military withdrawal from that nation were at best premature, at worst unpatriotic. A series of nominees who had faced difficulty in obtaining Senate confirmation in the post-Katrina spotlight were installed in their posts by recess appointment. The White House refused to provide an investigatory committee materials documenting its internal response to Katrina, and even prevented former FEMA director Brown from testifying about his contacts

with the White House during the crisis. In January 2006, the president likewise rejected even proffered legislative support for changing FISA. There was no need to “attempt to try to pass a law on something that’s already legal,” because the debate might reveal information that would “help the enemy.” Emphasizing the war was clearly the president’s battle plan for the year to come; for “conducting war,” he argued, “is a responsibility in the executive branch, not the legislative branch.” He added, “I don’t view it as a contest with the legislative branch.”⁴⁵ And certainly, to that point, “no contest” was an apt description.

PRACTICAL ADVANTAGES AND GRAVE DANGERS

Is there a “new imperial presidency”? That is, has the interbranch balance of power shifted back to the president to an extent comparable to the Vietnam/Watergate era? And if so, what are the consequences?

The short answer is “yes”: The 1970s resurgence regime has eroded, and presidential power has expanded to fill the vacuum. There are meaningful parallels between the justificatory language of the Nixon administration and that of our most recent presidents: each stressed the notion of “inherent” presidential power, the broad sweep of the constitutional “rights” of the office. This would have endured, albeit in different forms and contexts, even had the Kerry administration replaced the Bush administration in January 2005, for the argument is not individual but institutional.

As with most interesting questions, though, the short answer is rarely the full story. The narrative here depicts a set of linear trends: the rise of presidential power to the 1960s; the overstretch of the presidency past “savior” to “Satan”; the resurgence of other political actors through the 1970s; the counter-surge of presidential initiative starting in the 1980s and accelerating into overdrive after September 11, 2001. That is certainly accurate, as generalizations go. Precedents matter, and accrete, and future presidents will rely upon what is established now as the “normal” balance of presidential-congressional power.

But despite the consistent, and often successful, efforts of presidents to expand their institutional resources past the sparse grants of Article II, they ultimately remain subject to its constraints and part of a set of potential checks and counterbalances. The modern presidency has many potent tools, and a global reach, surely unforeseen by the architects of the Constitution. Yet the framework they designed remains. Presidential power, in a real sense, is the residual left over after subtracting out the power of other actors in the system.⁴⁶

As such, the power of the president remains conditional. And our assessment of it must also be conditional, underlain by a fundamental tension: in the American system of government strong executive leadership is at once unavoidable and unacceptable. Supreme Court Justice Robert Jackson perhaps put the dilemma best. “Comprehensive and undefined presidential powers,” he wrote in 1952, “hold both practical advantages and grave dangers for the country.”⁴⁷

The advantages are clear. After all, how can one provide direction to an enormous nation, with an enormous national executive establishment, with enormous public expectations—and still hope to limit the authority necessary to meet those needs? More than four million civilian and military employees work in the federal executive branch, across fifteen Cabinet-level departments and more than one hundred agencies. The annual federal budget verges on \$2.5 trillion (as much as the 1960 through 1974 budgets, combined.) A nation cannot meet crises, or even the day-to-day needs of governing, with 535 chief executives or commanders-in-chief driven by as many constituencies and spread across divided chambers. The problems of administration that arose during the Articles of Confederation period in a much smaller country, with a much smaller Congress, in what seemed a much larger world, were sufficient to drive the framers to submerge their fear of monarchy and empower a single person as president. These days, the flutter of a butterfly's wing in Wellington shifts the climate of Washington; a globalized, polarized world seems to call out for endowing leadership sufficient to match its powers to the tasks at hand.

On the other hand, presidential "leadership" is not by definition virtuous, if it does violence to Constitutional tenets. To accede to presidential hagiography—and thus executive dominance—is extraordinarily problematic for a republican form of government. The words of the anti-Federalist patriot Patrick Henry echo over the years: *If your American chief be a man of ambition, and abilities, how easy is it for him to render himself absolute?* We want men, and women, of ambition and abilities to serve as our presidents. But to pledge that their preferences should without need of persuasion become policy, that they should as a matter of course substitute command for coalition-building, is to cede something of the soul of self-governance. The dangers of unilateral authority are immense, because once those claims are asserted, they logically admit no limits.

That is not meant to be alarmist; but nor is it hypothetical. Consider the logic of the NSA white paper traced previously. Or, similarly, consider the administration's argument in the *Rumsfeld v. Padilla* enemy combatant case. The president claimed that he could, on the basis of "some evidence," remove someone from the court system and hold them without charge or trial. Deputy Solicitor General Paul Clement was subsequently asked during oral arguments before the Supreme Court to delineate the boundaries of this argument. If the September 14 resolution were insufficient authorization for such power, did the president still have the authority to deny trials to American citizens? Yes, Clement replied. Given the emergency created on September 11, "I think he would certainly today, which is to say September 12th, [2001] or April 28th, [2003]." And, in fact, "I would say the President had that authority on September 10th, [2001]." In that case, could you shoot an enemy combatant, or torture him? asked a Justice. Well, no, said Clement, "that violates our own conception of what's a war crime." Still, he was pressed, what if it were an executive command, what if torture were deemed necessary to garner intelligence? "Some systems do that to get information."

"Well," replied Clement, "our executive doesn't."

"What's constraining? That's the point. Is it just up to the good will of the executive?"

"You have to recognize that in situations where there is a war—where the Government is on a war footing—that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that."⁴⁸

The result comes back to what Schlesinger decried in the 1970s as a "plebiscitary presidency," in which presidents claim broad discretion to act, constrained only by quadrennial referendum on their decisions—a problematic model in the world of term-limited presidents and four elections in a row in which the winner has received 51 percent of the popular vote or less. In the meantime, voters must trust that the president was acting in their interests. "Our executive doesn't," the administration claimed; but history suggests our executive could.

The point is too important to be a punch line. We must accept that executive discretion is, in fact, increasingly important. Still, within what framework ought that discretion to be exercised? Who gets to set the boundaries between the branches? Who, even, in a war with parameters and enemies as fluid as in the "global war on terror," gets to decide when it starts and ends? Much as he might prefer it, the president is not alone in his responsibilities. Nor, even if he will not admit to mistakes, is the president always right. In our separated system, legitimizing large-scale change requires bridging its divisions, by building coalitions in Congress that are persuaded that the president is right. There is a clear normative difference between a presidential assertion of power that stands because of congressional inertia and a power delegated to the president after full and free debate. Justice Antonin Scalia's dissent in *Hamdi* reminds us that "The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it." Ambition must continue to counteract ambition.

The first branch's job is not to manage policy implementation on a day-to-day basis. Nor is it always to pass a new law: the resurgence regime bears witness to the inadequacy of creating a statutory framework in the absence of political will reinforcing its component parts. But Congress has a critical task nonetheless. Its job is to use debate and deliberation to distill priorities and set clear standards; to oversee and judge the decisions and actions of others by those standards; to expose both the bad and good efforts of government to public scrutiny; and to revisit its earlier debate in the light of later events. All this is Congress's job; and debate, judgment, and oversight are delegated to other actors in the system at our potential peril.

The goal of legislative deliberation is not to foster trust in government for its own sake; indeed, a healthy distrust of government is part of American history, and a valuable tool of accountability. We should, in President Reagan's words, "trust—but verify." We should work to make difficult decisions and trade-offs about the powers and goals of American government, about its very scope and direction. Indeed, given the crises that already define our new

century, doing so is our highest national priority. But it will require the active involvement of *all* our ambitions. "We must recognize," said a young John F. Kennedy, campaigning in his first election in 1946, "that if we do not take an interest in our political life, we can easily lose at home what so many young men so bloodily won abroad."⁴⁹

ENDNOTES

1. *Newsweek* issue of January 9, 2006; "Vice President's Remarks to the Traveling Press," Air Force Two, Office of the White House Press Secretary, December 20, 2005; Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2005), from which much of what follows is drawn.
2. Whether the president should be a "she" was not, of course, discussed at the time; and in talking about the presidency I will defer to historical fact and use the masculine pronoun to describe the office's occupants. But "he" should be read as "he, someday she."
3. Randolph is quoted in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 257. For a detailed description of the Constitutional Convention as it led to the drafting of Article II, see, among many sources, Rakove, Ch. 9; Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), Ch. 7.
4. See Edward S. Corwin, *The President: Office and Powers*, 5th rev. ed., with Randall W. Bland, Theodore Hinson, and Jack W. Peltason (New York: New York University Press, 1984), 3.
5. Theodore Roosevelt, *An Autobiography* (1913; reprint, New York: Da Capo Press, 1985), 372; William Howard Taft, *Our Chief Magistrate and His Powers* (1916), quoted in Christopher H. Pyle and Richard M. Pious, eds., *The President, Congress, and the Constitution: Power and Legitimacy in American Politics* (New York: Free Press, 1984), 70–71.
6. H.L. Mencken, *Notes on Democracy* (New York: Alfred A. Knopf, 1926), 185.
7. Fred I. Greenstein, "Toward a Modern Presidency," in Greenstein, ed., *Leadership in the Modern Presidency* (Cambridge, MA: Harvard University Press, 1988), 3.
8. Erwin C. Hargrove and Michael Nelson, *Presidents, Politics, and Policy* (New York: Alfred A. Knopf, 1984), 4.
9. Corwin, *President: Office and Powers*, 354.
10. Hargrove and Nelson, 4–5.
11. Schlesinger, x, 252; Michael A. Genovese, *The Watergate Crisis* (Westport, CT: Greenwood, 1999); Stanley I. Kutler, *The Wars of Watergate* (New York: Alfred A. Knopf, 1990).
12. Stephen E. Ambrose, *Nixon, Vol. III: Ruin and Recovery, 1973–1990* (New York: Touchstone, 1992), 508.
13. James L. Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: Brookings Institution, 1981), Ch. 1. See also Thomas Cronin, "A Resurgent Congress and the Imperial Presidency," *Political Science Quarterly* 95 (Summer 1980): 209–37.
14. *Congressional Record*, April 18, 1973, p. 13190.
15. Dom Bonafede, Daniel Rapoport, and Joel Havemann, "The President versus Congress: The Score since Watergate," *National Journal* (May 29, 1976), 738; Ford quoted in interview with *Time* magazine (November 10, 1980), 30.
16. Mike Allen, "Bush to Change Economic Team," *Washington Post*, November 29, 2004, A1. More generally see Thomas J. Weko, *The Politicizing Presidency: The White House Personnel Office, 1948–1994* (Lawrence: University Press of Kansas, 1994).
17. Fisher, *Presidential War Powers*, 140–41; Peter Huchthausen, *America's Splendid Little Wars: A Short History of U.S. Military Engagements, 1975–2000* (New York: Viking, 2003), Ch. 4.

18. Louis Fisher and David Gray Adler, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly* 113 (Spring 1998), 1.
19. Dan L. Crippen, "Observations on the Current State of the Federal Budget Process," Address at the Fall Symposium of the American Association for Budget and Program Analysis, November 22, 2002.
20. *Public Papers of the Presidents*, September 25, 1995, 1475; Francine Krieter, "Clinton Perfects the Art of Go-Along Governing," *Christian Science Monitor* (July 24, 1998), 3; see also David Gray Adler, "Clinton in Context," in Adler and Michael A. Genovese, eds., *The Presidency and the Law: The Clinton Legacy* (Lawrence: University Press of Kansas, 2002).
21. *Weekly Compilation of Presidential Documents* (March 13, 2002), 411; Cheney quoted from NBC broadcast interview of January 27, 2003, in Tom Curry, "Executive Privilege Again at Issue," *MSNBC.com*, February 1, 2003 [<http://www.msnbc.com/news/695487.asp?cpi=311>], and see Kenneth T. Walsh, "The Cheney Factor," *U.S. News and World Report* (January 23, 2006), 42–43.
22. Thomas Blanton, director of the private National Security Archive, quoted in Dana Milbank and Mike Allen, "Release of Documents Is Delayed," *Washington Post* (March 26, 2003), A15. More broadly—and for similar reaction by legislators of both parties, see Alison Mitchell, "Cheney Rejects Broader Access to Terror Brief," *The New York Times* (May 20, 2002), A1; Alexis Simendinger, "The Power of One," *National Journal* (January 26, 2002); Kirk Victor, "Congress in Eclipse," *National Journal* (April 5, 2003), 1069–70. The PRA order is E.O. 13223. The Energy Task Force saga is described in Rudalevige, *New Imperial Presidency*, 189–91.
23. "Authorization for Use of Military Force," Public Law 107–40 (September 18, 2001).
24. "President Holds Press Conference," Office of the White House Press Secretary, December 20, 2004; more generally, see Andrew Rudalevige, "George W. Bush and Congress: New Term, New Problems—Same Results?" in Douglas Brattabo, Thomas Lanford, and Robert Maranto, eds., *The Second Term of George W. Bush: Prospects and Perils* (New York: Palgrave Macmillan, 2006).
25. Quoted in Lisa Caruso, "You've Got to Know When to Hold 'Em," *National Journal* (July 12, 2003), 2258. The sentiment was bipartisan: Sen. Chuck Hagel (R-NE) similarly complained that "[this] administration . . . treats Congress as an appendage, a Constitutional nuisance." Quoted in David E. Rosenbaum, "In the Fulbright Mold, Without the Power," *The New York Times* (May 3, 2004), A16.
26. "Press Conference of the President," Office of the White House Press Secretary, December 19, 2005; and see Charles Lane, "White House Elaborates on Authority for Eavesdropping," *The Washington Post* (December 20, 2005), A10.
27. "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," Department of Justice, January 19, 2006, 1–2, 10–11, 17, 30–31.
28. See, for example, Article I's designation of Congress's authority to regulate the "land and naval forces," "captures on land or water," the militia, and "letters of marque and reprisal" (i.e., to hire private contractors to carry out warfare.)
29. Jess Bravin, "Judge Alito's View of the Presidency: Expansive Powers," *Wall Street Journal* (January 5, 2006), A1; Dan Eggen, "White House Dismisses '02 Surveillance Proposal," *The Washington Post* (January 26, 2006), p. A4. On OLC, see "Legal authorities," 30, 34n18, 40. The white paper notes that "a full explanation . . . cannot be given in an unclassified document"; but by most accounts such an explanation was not provided during classified briefings either. See also "Press Conference of the President," Office of the White House Press Secretary (January 26, 2006).
30. See Gonzales memo of January 25, 2002, entitled "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban"; Rumfeld quoted in Katharine Q. Seelie, "First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba," *The New York Times* (January 12, 2002), A7 (emphasis added); Seymour M. Hersh, "The Gray Zone," *The New Yorker* (May 24, 2004); John Hendree, "Officials Say Rumfeld OK'd Harsh Interrogation Methods," *Los Angeles Times* (May 21, 2004), A1; Dana Priest, "Covert CIA Program Withstands New Furor," *The Washington Post* (December 30, 2005).

- A1. The full text of the Gonzales memo, and many others besides, were later made public and are collected on-line in various places as well as in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers* (New York: Cambridge University Press, 2005).
31. See, e.g., Michael Fletcher, "Bush Defends CIA's Clandestine Prisons," *The Washington Post* (November 8, 2005), A15; Jane Mayer, "A Deadly Interrogation," *The New Yorker* (November 14, 2005).
 32. President's Military Order of November 13, 2001; Government's Brief and Motion, August 27, 2002, *Jose Padilla v. George Bush, Donald Rumsfeld, et al.* (U.S. Dist. Court, Southern Dist. of New York—Case No. 02-4445).
 33. See Jay Bybee to Alberto Gonzales, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A," Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, 1–6, 31–39; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, U.S. Department of Defense, April 4, 2003, 21 and Section III generally; "President's Statement on Signing of H.R. 2863," office of the White House Press Secretary (December 30, 2005). More generally see James P. Pfiffner, "Torture as Public Policy," unpublished ms., George Mason University School of Public Policy, 12–14; Mayer, "A Deadly Interrogation."
 34. While one can find isolated examples of the practice as early as the Jackson administration, it was Ronald Reagan who advanced it as a more systematic strategy aimed both to put the president's point of view in the "legislative history" (should the judiciary weigh in) and to better control executive branch behavior. Reagan's successors all used the tool, but none as aggressively as George W. Bush, who made more than 500 constitutional objections to legislation during his first term (by contrast, Bill Clinton made 105, over eight years.) See Phillip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use of Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35 (September 2005): 515–32; Ron Hutcheson and James Kuhnhehn, "Bush Asserts Power over Laws," *Philadelphia Inquirer* (January 16, 2006), A1; Elizabeth Bumiller, "For President, Final Say on a Bill Sometimes Comes After the Signing," *New York Times* (January 16, 2006), A11.
 35. John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (Indianapolis: Hackett, 1980 [1690]), 84; see §§159–160 generally.
 36. Further, presidents have become astute at adapting outdated or inexact statutes to current needs. President Roosevelt closed the banks in 1933 under the terms of a World War I law; President Clinton's 1996 designation of two million acres in Utah as conservation land, over the objections of state officials, was undertaken using a statute passed in 1906.
 37. Tom Daschle, "Power We Didn't Grant," *The Washington Post* (December 23, 2005), A21; Feinstein quoted in Ron Hutcheson, "Presidential Power a Key Issue in Debate over Eavesdropping," *Knight-Ridder* (January 23, 2006).
 38. *Hamdi v. Rumsfeld*, 124 U.S. 2633 (2004); *Padilla vs. Hanft*, 05–6396, Fourth Circuit Court of Appeals, September 9, 2005.
 39. *Goldwater v. Carter*, quoted in Ronald J. Sievert, "Campbell v. Clinton and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War," *Dickinson Law Review* 105 (Winter 2001), 167.
 40. "Statement on the Department of Justice Motion to Dismiss the Hamdan Case in the Supreme Court," Office of Sen. Carl Levin, January 12, 2006.
 41. Eric Schmitt, "Senators Assail Request for Aid for Afghan and Iraq Budgets," *The New York Times* (May 14, 2004), A1; Tyler Marshall, "The Conflict in Iraq: Unease Shadows Bush's Optimism," *Los Angeles Times* (September 17, 2004), A1.
 42. For civilian casualty estimate, see "President Discusses War on Terror and Upcoming Iraqi Elections," in Philadelphia, Pennsylvania, Office of the White House Press Secretary, December 12, 2005; for polling data see the CNN/USA Today/Gallup Poll sequence provided at <http://www.pollingreport.com/iraq.htm> [accessed January 3, 2006]. For discussion of the Iraq occupation, see, inter alia, James Fallows, "Why Iraq Has No Army," *Atlantic Monthly* (December 2005); George Packer, *The Assassins' Gate* (New York: Farrar Straus Giroux, 2005); James Glanz, "Iraq Rebuilding Badly Hobbled, U.S. Report Finds," *The New York Times* (January 24, 2006), A1.

43. The Supreme Court, however, while reserving the right to visit the case's broader issues, allowed the shift.
44. Quoted in James Kuhnhehn, "Senators Taking Reins of Their Watchdog Role," *Philadelphia Inquirer* (January 29, 2006), A3.
45. Thomas B. Edsall, "Bush Appointments Avert Senate Battles," *The Washington Post* (January 5, 2006), A13; Eric Lipton, "White House Declines to Provide Storm Papers," *The New York Times* (January 25, 2006), A1; "Press Conference of the President," Office of the White House Press Secretary, January 26, 2006; Richard Wolffe and Holly Bailey, "The Bush Battle Plan: It's the War, Stupid," *Newsweek* (January 30, 2006).
46. Thanks to William Howell and Jon Pevehouse for suggesting this formulation.
47. Concurring opinion to *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
48. From the transcript of the oral arguments before the U.S. Supreme Court in *Rumsfeld v. Padilla*, April 28, 2004, available from the Court's Web site (<http://www.supremecourtus.gov>).
49. Quoted in Robert Dallek, *An Unfinished Life: John F. Kennedy, 1917–1963* (Boston: Little, Brown, 2003), 132.

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